

THE STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona

September 7, 2006

10:00 a.m.

Reported by:

Lilia Monarrez
Certified Reporter (AZ 50699)

Draft Copy

Page 2

1 A PUBLIC MEETING, BEFORE THE CITIZENS CLEAN
 2 ELECTIONS COMMISSION, convened at 10:00 a.m. on September
 3 7, 2006, at the State of Arizona, Clean Elections
 4 Commission, 1616 W. Adams, Conference Room, Phoenix,
 5 Arizona, in the presence of the following Board members:
 6 Ms. Marcia Busching, Phoenix, Chairperson
 7 Mr. Gary Scaramazzo, Page, Teleconference
 8 Ms. Ermila Jolley, Yuma
 9 Mr. Carl Kunasek, Maricopa
 10 Ms. Royann J. Parker, Pima, Teleconference
 11 OTHERS PRESENT:
 12 Mr. Todd Lang, Executive Director
 13 Mr. Peter Silverman, Assistant Attorney General
 14 Colleen McGee, Deputy Director
 15 Paula Ortiz, Executive Assistant
 16 Michael Becker, Voter Education Manager
 17 Christina Murphy, Fiscal Services Manager
 18 Daniel Ruiz II, Campaign Finance Manager
 19 Eric Peterson, Administrative Counsel
 20 Terri Kessler, Lovullo for Legislature
 21 Lisa Lovullo, Lovullo for Legislature
 22 Andy Gordon, Attorney for Janet Napolitano
 23 Christian Palmer, Arizona Capitol Times
 24 David Maddox, Attorney for Munsil Campaign
 25 Doug Drury, Len Munsil for Governor
 Lee Munsil, Len Munsil Campaign
 Paul Peterson, Off Madison Avenue
 Lauren Lowe, Perkins Cole Brown & Bain
 Jan Van Amerongen, Citizen
 Don Goldwater, Goldwater for Governor
 Dough Wyriane, Attorney for Goldwater
 Dan Wooten, Goldwater for Goldwater
 Miriam Beach, Citizen
 Jerry Duff, Jason Williams Committee
 Paul Davenport, Associated Press
 John Wildermuth, San Francisco Chronicle
 Michael Bailey, Citizen
 Chip Scutari, Arizona Republic
 Howie Fischer, East Valley Tribune
 Douglas Wymore, Goldwater for Governor
 Ted Downing, Downing for Senator
 Paula Aboud, Aboud for Senator, teleconference

Page 3

1 PROCEEDING
 2
 3 CHAIRPERSON BUSCHING: I will call this
 4 meeting of the Citizens Clean Election Commission to
 5 order. It is 1616 West Adams, Suite 110, Phoenix, Arizona
 6 85007.
 7 Today is Thursday, September 7, 2006. It's
 8 approximately 10:05 a.m.
 9 I want to note that the Commission may vote
 10 to go into executive session, which will not be open to
 11 the public, for any item listed on the agenda, for
 12 obtaining legal advice. All matters on the agenda may be
 13 discussed, considered and are subject to action by the
 14 Commission, and because of the number of items and the
 15 interest on the agenda, I will limit initial comments to
 16 10 minutes from anyone in the audience and any rebuttal
 17 comments to 5 minutes.
 18 I will also note that all commissioners are
 19 present either in person or by telephone conference.
 20 The first item on the agenda was the call to
 21 order, which has already been done. The second item is
 22 the Executive Director's report, and we do not have any
 23 minutes for today. They will address those next time.
 24 Mr. Lang?
 25 MR. LANG: Thank you, Madam Chair.

Page 4

1 Good morning, Commissioners. I'll be very
 2 brief. As you can see, my Executive Director report is
 3 brief.
 4 I want to congratulate Christina Murphy.
 5 She's received her master's degree in business
 6 administration; very, very impressive and congratulations.
 7 We're working on replacing or getting a new
 8 person for the Administrative Assistant III position.
 9 Paula is working with Mike Becker on that.
 10 And then you can see my comments on push
 11 poll. These are certainly a major challenge because we
 12 don't have the kind of information we like to award
 13 matching funds and, you know, it's sort of underhanded, in
 14 my opinion, my personal opinion, because it -- it makes it
 15 very difficult for the system to work properly both for
 16 our office and for the Secretary of State's office. And
 17 so when folks are engaged in legitimate polls and they see
 18 we're considering matching funds, my hope is that they'll
 19 come forward quickly and let us know the financial
 20 information so that we can make an accurate and correct
 21 evaluation.
 22 Unless you have questions, that concludes my
 23 report.
 24 CHAIRPERSON BUSCHING: Any questions of
 25 Mr. Lang?

Page 5

1 If not, we'll move to Item III, consideration
 2 and decision whether there is reason to believe a
 3 violation occurred in the following enforcement matters:
 4 A. MUR 06-0014, complaint against Jason Williams.
 5 Mr. Lang?
 6 MR. LANG: Thank you, Madam Chair,
 7 Commissioners.
 8 You have before you my statement of reasons
 9 and you also should have a response by Mr. Jason Williams
 10 that we received on September 5th and I, of course, read
 11 those with care and made a recommendation. What you have
 12 is a failure to file trigger reports on time. His
 13 original report -- and as you recall, the original report
 14 is due when a nonparticipating candidate spends up to
 15 70 percent of the participating candidate's allotment.
 16 And when he reached that trigger, he filed
 17 that report in a timely manner on May 1st, but then on
 18 August 3, he reached the next threshold per a supplemental
 19 triggering report. And that meant his next report was
 20 due -- it was on that -- during August, it's a weekly
 21 report, and that next report was due on August 8th. He
 22 didn't report his August 8th trigger until August 15th,
 23 seven days late. And his total expenditures at that time
 24 were \$60,000, so we're talking about a substantial amount
 25 of matching funds.

Page 6

1 The reason he was late, according to his
2 response, is that he had not yet received a final invoice
3 from the vendor and there was a delay because the signs
4 that he had ordered were damaged and he needed to know the
5 difference in order to find out the final payment due.
6 And, you know, while we completely believe and trust his
7 response, it doesn't change our evaluation because one of
8 the things that this commission has advised candidates
9 since day one, you know, many campaigns ago, is that in
10 particular with signs, you report them when you order
11 them, when the obligation is incurred.

12 He tries to compare this to Napolitano -- the
13 Napolitano matter but, in fact, it's quite different. The
14 Napolitano involved a novel issue that had not yet been
15 before the Commission. Signs are well established and the
16 rules are well known and, for that reason, I recommend
17 that the Commission find a violation or find reasonably
18 there may have been a violation and allow me to conduct an
19 investigation.

20 CHAIRPERSON BUSCHING: Thank you.

21 Are there any questions of Mr. Lang?

22 If not, is there anyone from the audience
23 that wishes to speak to this matter?

24 Okay. Any discussion or a motion?

25 COMMISSIONER KUNASEK: Madam Chair, I would

Page 8

1 also a response by Ms. Lovallo.

2 As you can see from the evaluation, she was
3 24 days late on her original report regarding \$9,000 of
4 expenditures. Then her supplemental report was 28 days
5 late. She was -- it was due on July 18th, but she didn't
6 report it until August 15th. And that was for \$2,300 in
7 expenditures and then another supplemental report, a third
8 delay, was seven days late. That was reported on August
9 15th, and it should have been reported on August 8th for
10 \$11,000 -- a little over \$11,000 in expenditures. That
11 one was more important to us because that one delayed
12 matching funds.

13 And as you can see from the response, these
14 were completely inadvertent. This was because the
15 treasurer was counting on the popup prompt that you get
16 when you do these reports to let her know that the reports
17 were due, but the problem is if you don't keep up your
18 expenditures on a daily basis, you're not going to get
19 those popup's. And so that's what happened here. This
20 was a common problem back in 2002, and we haven't seen it
21 as much this year due to our education efforts.

22 Unfortunately, it happened in this case, and
23 so while I think there was no intention to violate here, I
24 do recommend that the Commission find reason to believe
25 that there may have been a violation and allow us to

Page 7

1 move that 06-0014, complaint against Jason Williams, be
2 progressed to an investigation.

3 CHAIRPERSON BUSCHING: And we find reason to
4 believe?

5 COMMISSIONER KUNASEK: Reason to believe,
6 uh-huh.

7 CHAIRPERSON BUSCHING: Okay. Is there a
8 second?

9 COMMISSIONER JOLLEY: I will second that.

10 CHAIRPERSON BUSCHING: It's been moved by
11 Commissioner Kunasek and seconded by Commissioner Jolley
12 that we find reason to believe that a violation occurred
13 in the matter of MUR 06-0014, complaint against Jason
14 Williams.

15 All in favor say aye.

16 (Chorus of ayes.)

17 Opposed nay.

18 The Chair votes aye. The motion carries.

19 III B, MUR 06-0015, complaint against Lisa

20 Lovallo.

21 MR. LANG: Commissioners, you have before you
22 my statement of reasons. You should also have -- just to
23 make sure we all are on the same page. You should have a
24 memo from Daniel Ruiz. You should have a response from
25 the Lovallo campaign by Terri Kessler, the treasurer, and

Page 9

1 proceed with the investigation and discussion with Ms. --
2 with the Lovallo campaign.

3 CHAIRPERSON BUSCHING: Okay. Thank you.

4 Are there questions of Mr. Lang?

5 COMMISSIONER KUNASEK: Yeah. Madam Chair,
6 Mr. Lang, I see on the September 6th memo from Daniel Ruiz
7 that they had -- the response is noncompliant. It's not
8 properly notarized.

9 Have we returned this to the party requesting
10 a proper response?

11 MR. LANG: Yeah, I apologize for not
12 clarifying that. Actually, Ms. Lovallo came in and
13 properly notarized it, and so we do have a properly
14 notarized response.

15 COMMISSIONER KUNASEK: Okay.

16 CHAIRPERSON BUSCHING: Mr. Lang, the one that
17 was signed by Ms. Lovallo is an acknowledgment and not
18 sworn to --

19 MR. LANG: Right.

20 CHAIRPERSON BUSCHING: Are you distinguishing
21 those?

22 MR. LANG: That's not -- we have one that's
23 properly notarized. This one not only is it acknowledged,
24 which is not adequate, but it's actually stapled on. And,
25 as you know, that was an issue in another matter, and so

Page 10

1 that's been corrected.

2 CHAIRPERSON BUSCHING: Okay. So a matter of

3 public information, this one is not acceptable.

4 MR. LANG: This is not acceptable. Thank you

5 for clarifying that. This is not acceptable and we have

6 the proper one. It was done this morning.

7 CHAIRPERSON BUSCHING: Okay. Are there

8 questions of Mr. Lang?

9 Commissioner Jolley.

10 COMMISSIONER JOLLEY: Yes.

11 Mr. Lang, I notice that Ms. Kessler, the

12 treasurer, is a volunteer, but even though she is a

13 volunteer, the ultimate responsibility is with the

14 candidate.

15 MR. LANG: That's right.

16 COMMISSIONER JOLLEY: Okay.

17 CHAIRPERSON BUSCHING: Any other questions of

18 Mr. Lang?

19 Is there anyone from the public that wishes

20 to speak as to this matter?

21 Ma'am?

22 MS. LOVALLO: Madam Chairperson and

23 Commissioners --

24 CHAIRPERSON BUSCHING: Come on forward and

25 state your name, please.

Page 11

1 MS. LOVALLO: Okay.

2 CHAIRPERSON BUSCHING: Speak into the

3 microphone.

4 MS. LOVALLO: Okay.

5 AUDIENCE MEMBER: This one doesn't do you any

6 good, but that's okay.

7 MS. LOVALLO: Thank you.

8 CHAIRPERSON BUSCHING: Repetition, comments

9 are limited to 10 minutes.

10 MS. LOVALLO: Okay. I just wanted to thank

11 the Commission for the opportunity to be here today. I am

12 Lisa Lovallo, and I came up because obviously my campaign

13 wants to be sure that we do things properly. And I want

14 to introduce my treasurer, Terri Kessler, who is also here

15 today. I just -- we just came up in case the Commission

16 has any additional questions that you'd like to ask us

17 that we can answer them for you.

18 CHAIRPERSON BUSCHING: Okay. Are there

19 questions of Ms. Lovallo?

20 Now, I want to express our appreciation for

21 coming up and taking an interest and doing your best to

22 understand the process.

23 MS. LOVALLO: Thank you.

24 CHAIRPERSON BUSCHING: That's -- we

25 appreciate that very much.

Page 12

1 Anyone else from the public wish to speak

2 today?

3 If not, the Chair will entertain a motion or

4 discussion.

5 COMMISSIONER KUNASEK: Madam Chair, I have a

6 question for -- I was not attentively listening at your

7 recommendation, Todd.

8 What do you recommend in this one?

9 MR. LANG: I find -- I recommend that the

10 Commission find a reasonable belief that there may have

11 been a violation.

12 COMMISSIONER KUNASEK: I would move that we

13 find there may be reason to believe there may have been a

14 violation.

15 CHAIRPERSON BUSCHING: Okay. Is there a

16 second?

17 COMMISSIONER JOLLEY: I would second it.

18 CHAIRPERSON BUSCHING: It's been moved by

19 Commissioner Kunasek and seconded by Commissioner Jolley

20 that the Commission find reason to believe that a

21 violation may have occurred in MUR 06-0015, complaint

22 against Lisa Lovallo.

23 Any further discussion?

24 If not, the Chair will call for the question.

25 All in favor say aye.

Page 13

1 (Chorus of ayes.)

2 CHAIRPERSON BUSCHING: Oppose nay?

3 Ms. Parker, did you vote?

4 COMMISSIONER PARKER: Yes, I voted aye.

5 CHAIRPERSON BUSCHING: Okay. The Chair votes

6 aye. The motion carries.

7 Next item, Item IV, discussion and possible

8 action regarding designating commission representative for

9 the purpose of informal settlement conference request by

10 Larry Nelson, candidate for State Mine Inspector.

11 Mr. Lang?

12 MR. LANG: Madam Chair, Commissioners, the

13 Commission has already found reason to believe there may

14 have been a violation, and Mr. Nelson has been cooperative

15 throughout this process and has now asked that a member of

16 the Commission or some -- or an appropriate designee be

17 designated to engage in a formal settlement conference.

18 CHAIRPERSON BUSCHING: And is Mr. Nelson

19 located in Maricopa County or is he located elsewhere, or

20 do you know?

21 MR. LANG: I don't know. I don't know that.

22 I should know that, but I don't.

23 Why don't you go check. We'll check.

24 COMMISSIONER JOLLEY: I have a question. Can

25 I ask a question?

Page 14

1 CHAIRPERSON BUSCHING: Yes, Commissioner
 2 Jolley.
 3 COMMISSIONER JOLLEY: Okay. Will this
 4 election be resolved or will it be completed by the
 5 primary? Is it two republican candidates running for Mine
 6 Inspector?
 7 MR. LANG: That's right. It's Mr. Nelson and
 8 Mr. Heart.
 9 COMMISSIONER JOLLEY: Okay.
 10 MR. LANG: And this will not be resolved by
 11 the primary.
 12 COMMISSIONER JOLLEY: Okay.
 13 CHAIRPERSON BUSCHING: Mr. Nelson has a Mesa
 14 address, according to the --
 15 COMMISSIONER KUNASEK: Guide.
 16 CHAIRPERSON BUSCHING: -- guide, yes.
 17 Although it's not mandatory, a number of
 18 times in the past we've tried to match the designation of
 19 a commission representative with the location of the
 20 candidate or official as closely as possible so that a
 21 meeting could occur near the site of where that person is,
 22 in which case in this case it would be you, Mr. Kunasek.
 23 Are you willing, under the circumstances
 24 to --
 25 COMMISSIONER KUNASEK: If they're willing to

Page 15

1 come to San Diego later this afternoon, I can take care of
 2 that.
 3 CHAIRPERSON BUSCHING: Hmm, that presents a
 4 small problem.
 5 How soon does the settlement conference have
 6 to occur, Mr. Lang?
 7 MR. LANG: There's -- there's no time limit.
 8 There's no requirement under 200 in this case because
 9 we're still in the first step.
 10 CHAIRPERSON BUSCHING: Oh, okay.
 11 Is Mr. Nelson here?
 12 MR. LANG: No, he's not.
 13 CHAIRPERSON BUSCHING: Have you gotten --
 14 COMMISSIONER KUNASEK: Excuse me. Madam
 15 Chair, can one of the staff conduct this?
 16 CHAIRPERSON BUSCHING: We have typically not
 17 had the staff done it or do it because they are ones that
 18 have come up with the recommendation in the first place.
 19 COMMISSIONER KUNASEK: Okay.
 20 CHAIRPERSON BUSCHING: So they'd be arguing
 21 against --
 22 COMMISSIONER KUNASEK: Themselves.
 23 CHAIRPERSON BUSCHING: -- themselves, yes.
 24 COMMISSIONER KUNASEK: Thank you.
 25 CHAIRPERSON BUSCHING: Well, I'd be certainly

Page 16

1 willing to do it.
 2 How soon are you going to be back?
 3 COMMISSIONER KUNASEK: Probably two weeks.
 4 CHAIRPERSON BUSCHING: Okay. So that works
 5 out fine. Yeah, if he wants it within the next two weeks,
 6 why don't we designate me and if it's sometime after that,
 7 well, then he'll have you, if that works.
 8 COMMISSIONER KUNASEK: We'll agree upon a
 9 date.
 10 CHAIRPERSON BUSCHING: Okay.
 11 COMMISSIONER KUNASEK: Okay?
 12 CHAIRPERSON BUSCHING: All right. Does
 13 someone want to make it a motion?
 14 COMMISSIONER KUNASEK: I would so move that
 15 we appoint a representative to attend this settlement
 16 conference to alleviate the matters in the Mr. Nelson and
 17 Mary Picket, candidate for Mine Inspector and his
 18 treasurer.
 19 CHAIRPERSON BUSCHING: Okay. And that person
 20 would be either you or me depending on availability.
 21 COMMISSIONER KUNASEK: Right.
 22 CHAIRPERSON BUSCHING: Is there a second?
 23 COMMISSIONER JOLLEY: I will second that.
 24 CHAIRPERSON BUSCHING: It's been moved by
 25 Commissioner Kunasek and seconded by Commissioner Jolley

Page 17

1 that we designate either Commissioner Kunasek or
 2 Commissioner Busching as the Commission representative for
 3 the purpose of an informal settlement conference with
 4 respect to the Larry Nelson matter, the designation of the
 5 Commission representative being dependent upon the
 6 availability of the respective commissioner.
 7 Any further discussion?
 8 If not, the Chair will call for the question.
 9 All in favor say aye.
 10 (Chorus of ayes.)
 11 CHAIRPERSON BUSCHING: The Chair votes aye.
 12 The motion carries.
 13 I understand from the Executive Director that
 14 we may be moving an item on the agenda at this point.
 15 Mr. Lang, do you --
 16 MR. LANG: Madam Chair, thank you. I would
 17 prefer to have the Ted Downing matter, Item VI, heard
 18 before Item V. The problem is Mr. Downing indicated he
 19 was going to be here today but that he would be late. He
 20 is -- he is late, and so I guess I'd ask that you just
 21 proceed on the normal agenda course since he's not here.
 22 CHAIRPERSON BUSCHING: Okay. Let me ask, is
 23 there anyone here to speak on behalf of Mr. Downing?
 24 Okay. All right. Well, then we'll go in the
 25 normal -- in the posted order of the agenda.

Page 18

1 Item V, consideration and decision whether
2 push poll (telephone survey) constituted express advocacy
3 for Len Munsil or Don Goldwater and estimated cost for
4 matching funds.

5 Mr. Lang?

6 MR. LANG: Madam Chair, I want to make sure
7 all the commissioners have the documents that we received
8 because many of them came very late. You have my
9 memorandum. There's a letter from the law firm of Muller
10 & Drury dated September 3rd with a received stamp of
11 September 5. There's a letter dated September 5 from them
12 with no received stamp, and there's a letter dated
13 September 6. So we have three letters from Miller and --
14 Muller & Drury that contain -- most of them contain
15 affidavits. Then we also have the letter from the
16 Goldwater campaign, which is also -- which has been
17 notarized, so I just want to make sure you have all those
18 documents in front of you.

19 Then, finally, we received an affidavit today
20 from Shawn Noble regarding the cost of responding to a
21 push poll, and that should be just loose.

22 Okay. You have that? All right.

23 COMMISSIONER KUNASEK: Yes.

24 MR. LANG: And I know the folks on the phone
25 may not have this. I apologize for that. These were --

Page 19

1 some of them were received today, so I'll go over them
2 when it's timely to do so.

3 And you have my memorandum. This is -- this
4 involves a push poll, a similar issue to the one the
5 Commission addressed last week with Mr. Downing. And as
6 you can see, the facts to me indicate that it is express
7 advocacy under our standard. When you look -- the first
8 one may not be because that's simply a regular poll
9 question: Do you plan -- do you support the Goldwater
10 plan to build a wall in Arizona's border?

11 And then you have two so-called questions
12 which might be poll questions but also are express
13 advocacy because they -- they meet the standards for
14 independent expenditures. You see the question there:
15 Len Munsil has been touted as a family values candidate;
16 would it affect your vote if you knew he had an
17 illegitimate child?

18 For the record, Mr. Munsil, of course, denies
19 that assertion. The second question is: Would it affect
20 your vote if you knew Len Munsil had said the terrorist
21 attack of 9/11 was an act of God? And, again, although
22 Munsil explains that characterization, he disagrees with
23 the way it's put in this question. So both questions are,
24 in Munsil's position -- in Munsil's view,
25 mischaracterizations and paint him in a negative light.

Page 20

1 And when you go to the standard for express
2 advocacy under our analysis portion 16-901.01, of course,
3 these don't say vote for or elect Len Munsil or elect Don
4 Goldwater or anyone else, for that matter, but they do --
5 they are in a broadcast medium and, in my view, they have
6 no other meaning but to advocate for the defeat of Len
7 Munsil based on the identification of his name. He's
8 painted in a negative light in this case, and I think it
9 has no other reasonable meaning other than that.

10 So this raises the question should we give
11 matching funds and, if so, how much. Well, under the
12 reasoning we used in the Ted Downing matter, matching
13 funds are appropriate and should be awarded. The problem
14 is how much. And you can see in my recommendation, I
15 discuss at some length the Downing matter and the reason I
16 do that is because in Downing, we issued the matching
17 funds. The Commission issued the matching funds based on
18 my recommendation and based on calculations of 11,000
19 voters.

20 Well, of course, we had -- that was a
21 successful decision by the Commission, a proper decision
22 by the Commission not only because it was fair in light of
23 what we knew then, but also because it drew out the truth
24 of the matter. Because we issued matching funds, I
25 believe the folks who actually engaged in the

Page 21

1 communication with Downing came forth with their
2 affidavits and the documents, which you saw in the Downing
3 file, and acknowledged the actual price and the actual
4 expenditure and the actual purpose, and so the public and
5 the Commission got the full information in that case.

6 So I think the Commission policy of awarding
7 matching funds for what we believe to be push polls is
8 appropriate even in the case of the Downing matter where
9 it turned out it may have not been a push poll, and it's
10 appropriate because it's the best to do under the
11 circumstances and because it prompts more information for
12 the public and that's a good thing.

13 In the Downing matter, we only had five
14 people who said they were called with the message, and we
15 extrapolated that to 11,000 and awarded the funds. You
16 see the problem there, of course. We don't have a lot of
17 information because the nature of these things are we're
18 not going to be able to get a lot of information, and
19 neither the Downing folks nor the Goldwater folks nor the
20 Munsil folks are going to be able to provide a lot of
21 information because people don't generally call in or
22 provide the -- or give their information.

23 So we have to do it with affidavits from the
24 campaigns, the information provided by the campaigns, and
25 our own contacts with experts, and that's what we did in

Page 22

1 this case. So given the fact that we had originally four
2 affidavits from the Munsil campaign -- it ended up being
3 more than eight -- that's how we calculate it.

4 Now, I should go back and, first, in the
5 Goldwater matter, I took both the Munsil campaign and the
6 Goldwater campaign's affidavits and statements and letters
7 at their word. I believe everything they told me. I
8 believe that neither the Munsil campaign nor the Goldwater
9 campaign was involved, and I believe that Mr. Goldwater is
10 genuinely unhappy with this push poll. That said, that
11 doesn't constitute express advocacy in a way that would
12 hurt Mr. Goldwater.

13 As you recall, both candidates asked for
14 matching funds but in no way can I construe these calls to
15 be express advocacy against Mr. Goldwater and, therefore,
16 I do not recommend that the Commission issue matching
17 funds to Mr. Goldwater despite my belief of what he says
18 that he was grieved by these calls and he doesn't think
19 they helped his campaign. The nature of independent
20 expenditures are troublesome because although they're
21 endorsing a particular candidate or attacking a particular
22 candidate, that candidate may not welcome them. And I
23 think that's the case here with Mr. Goldwater, but the
24 fact that he didn't welcome these -- these expenditures
25 doesn't change the fact that he's not entitled to matching

Page 24

1 would be reasonable to construe that the push poll was
2 conducted of Maricopa County residents, not statewide.
3 And if you multiply the number of folks who voted in the
4 Republican primary in 2002, which is 183,811 by 72, that
5 produces a figure of 132,000 -- a little over \$132,000,
6 and so staff thinks that's a reasonable amount -- a
7 reasonable ceiling for what should be given.

8 I think there's an argument that no money
9 should be given because of the inaccuracy or because of
10 the difficulty of the situation, but I think ultimately
11 that would be unfair to the Munsil campaign and unfair to
12 victims of push polls. We have to go with the best
13 information we have, and that's what we've done here.
14 I've -- given the fact that we don't know how broad this
15 poll was; we don't know how many people were called, I
16 would hazard a guess that 183,000 people weren't called,
17 but we don't know that.

18 It may have been true. And so I think the
19 Commission is justified in awarding 132,000, but in my
20 view, I think the proper amount is 80,000. That's ten
21 sometimes more than what Mr. Downing receives. It's an
22 acknowledgement this is a statewide campaign, but it's
23 also an acknowledgement of the inexact science of this.
24 Ultimately, push polls are bad for democracy, I think,
25 but, you know, the First Amendment applies and they're

Page 23

1 funds.

2 Getting back to Munsil, the difficulty here,
3 of course, is calculating the number of matching funds,
4 and you see from their letters the Munsil campaign is
5 asking for approximately \$230,000, which represents well
6 more than half their primary allocation for one push poll.
7 And I think that's simply way too much. I think you can
8 do a push poll -- an effective, legitimate push poll for a
9 lot less based on what I've learned talking to experts.

10 But you also have Mr. Noble's affidavit where
11 he talks about the fact given the time frame, we really
12 need to do calls, and that would cost about \$180,000 or at
13 least an ad; a radio ad would cost \$50,000 or a TV buy
14 would cost \$72,000. So they're asking for \$302,000. I
15 think that's reasonable if you want to completely
16 inoculate the poll, but the purpose of the Clean Elections
17 Act is to give people an opportunity to respond. And
18 because we don't have an exact number and because we don't
19 know how broad it is, I'm not comfortable recommending
20 that much money. I think it's simply too much money.

21 What we did notice, though, was that in all
22 the Munsil affidavits, which were approximately eight --
23 there were other affidavits but those were regarding the
24 fact that they had no role in this push poll -- all were
25 from Maricopa County. And so staff determined that it

Page 25

1 entitled to do it, but until folks come into compliance, I
2 think we need to award money and I think \$80,000 is the
3 proper amount.

4 I know a lot of folks are here today to
5 discuss this and I certainly welcome their comments.

6 CHAIRPERSON BUSCHING: Okay. Thank you,
7 Mr. Lang.

8 Other questions of Mr. Lang?

9 I have a couple of questions.

10 Mr. Lang, the copy that I received was not
11 signed by you of your recommendation. I assume that the
12 original is signed in the file.

13 MR. LANG: That's correct, Madam Chair.

14 CHAIRPERSON BUSCHING: Okay.

15 MR. LANG: We did this because we wanted to
16 get it out quickly yesterday.

17 CHAIRPERSON BUSCHING: Okay. And in your
18 computation of your numbers and the fact that we are now
19 making this decision a mere few days before the voting,
20 have you taken into account how many early ballots have
21 already been received and submitted and should be
22 discounted as a result? Because those folks, obviously,
23 would not be in a position to be changing their vote.

24 MR. LANG: I'd like to tell you that, in
25 fact, that's why I discounted it from 132 to 80, but it's

Page 26

1 not true. I have not taken that into account, but that's
 2 another reason for a discount from the original amount
 3 that they're requesting; but I have not -- I did not do
 4 that calculation.

5 CHAIRPERSON BUSCHING: Okay.
 6 Commissioner Kunasek.

7 COMMISSIONER KUNASEK: The addendum to that
 8 question are -- I know early ballots are not counted, at
 9 least I thought they were not counted until election week.

10 Do we have any idea how many have been cast
 11 even? Is that number counted?

12 It is. Okay. Thank you. Thank you all.

13 MR. GORDON: That's a normal number.

14 CHAIRPERSON BUSCHING: I didn't hear the
 15 answer.

16 COMMISSIONER KUNASEK: The answer is the
 17 ballots cast have been counted, but the ballot -- the vote
 18 has not been counted. So they know how many ballots have
 19 been received back in but they won't count them until --

20 CHAIRPERSON BUSCHING: Until the appropriate
 21 time.

22 COMMISSIONER KUNASEK: Yes.

23 CHAIRPERSON BUSCHING: Okay.

24 Any other questions for Mr. Lang?

25 COMMISSIONER PARKER: I have one, Mr. Lang.

Page 28

1 First, I want to thank Mr. Lang,
 2 Mr. Peterson, the Commission staff and the commissioners.
 3 Timing is everything in elections and we just very much
 4 appreciate the fact that you have taken this promptly and
 5 addressed these very important issues in a timely manner
 6 in a time hopefully that can do us some good and undoing
 7 this damage.

8 Part of the reason we think we have been
 9 severely damaged is due to this timing. We learned of
 10 this late Friday afternoon on September 1st. Obviously,
 11 too late to do anything Labor Day weekend, so this was out
 12 there, front -- B1 of the Republic, A8 of the Tribune,
 13 Kingman, Ajo, Tucson, all the around the state all over
 14 the weekend and had time -- that information had time to
 15 be out there all weekend.

16 The poll itself is the most despicable and
 17 sleazy kind of thing that anybody can do a candidate by
 18 attacking his family. And when Mr. Lang talks about
 19 scope, I appreciate that because that's been the
 20 difficulty we've had. We've received over two dozen
 21 calls. That's what our affidavits say, and I do want to
 22 point to the Commissioner, just as an example, we sent out
 23 a mailer of 4,500, a campaign mailer, and from that --
 24 from that we got six calls and 70 emails that we -- the
 25 affidavit says.

Page 27

1 This is Commissioner Parker.

2 In the materials that we were given as part
 3 of Mr. Goldwater's response to this, it sounds he was a
 4 victim of a push poll as well.

5 Are we looking into that matter or is it
 6 still the Secretary of State?

7 MR. LANG: That's a separate madam -- matter,
 8 Commissioner Parker, and we're not looking into that. I
 9 understand this point and I understand this frustration,
 10 but that has no implicate -- that has no application to
 11 this.

12 COMMISSIONER PARKER: Thank you.

13 CHAIRPERSON BUSCHING: Okay. Any other
 14 questions of Mr. Lang?

15 If not, is there anyone from the public that
 16 wishes to speak to this matter?

17 Sir?

18 MR. DRURY: Good morning.

19 CHAIRPERSON BUSCHING: Please come forward
 20 and state your name, speak into the microphone, and you
 21 are reminded that you have a ten-minute time limit.

22 MR. DRURY: Thank you.

23 I'm Douglas Drury from the Len Munsil
 24 campaign. I'm the one who's been providing this
 25 information to Mr. Lang.

Page 29

1 So it's hard to gage when people are
 2 contacted, by how many contact your campaign back, how
 3 widespread the poll is, but we do have six -- we have nine
 4 affidavits that we submitted to the Commission. Five of
 5 them were able to say, While I was listening to these
 6 questions, I could hear basically a phone bank type of
 7 operation going on in the background. So this isn't
 8 somebody making a few calls. This was widespread.

9 We've got -- some of our affidavits are from
 10 political people and precinct committee men. From our
 11 end, that's to be expected. Those are the people who are
 12 engaged who heard this and knew immediately that there was
 13 something wrong and they called our campaign, but we have
 14 at least one affidavit from just a citizen who was called
 15 randomly. So we know this wasn't targeted just toward
 16 political types.

17 So we do believe these calls were widespread
 18 and we've been having to deal with this not just newspaper
 19 reports throughout the state -- and I appreciate Mr. Lang
 20 saying the calls were to Maricopa County -- the affidavits
 21 were from Maricopa County. That is where they came from,
 22 but the information was spread statewide through
 23 television stations, radio and newspapers all around the
 24 state. It went to every corner, as far as we can tell,
 25 and it's been repeated.

Page 30

1 And the old statement a lie travels halfway
 2 around the world before the truth has the time to put on
 3 its pants applies here. We're getting questions. A
 4 colleague of mine was asked this morning by a supporter
 5 and a long time -- somebody who's known Len for a long
 6 time said, "Gee, I heard about this. I didn't know Len
 7 had an legitimate child." So this is what -- in the last
 8 days of the campaign, we're dealing with that instead of
 9 border security, taxes, and the other issues that are
 10 important to Arizona.

11 So the amount we ask for is quite a bit.
 12 Mr. Lang is right about that, but Mr. Noble's affidavit
 13 supports that amount and we didn't arrive at that amount
 14 randomly. We -- and over the weekend, I had a chance to
 15 see Mr. Lang's recommendation on the Downing matter, and
 16 basically all we did was take that standard that was
 17 applied of \$0.72 a call for voters in the district and
 18 just applied it statewide. In fact, if you multiply the
 19 amount given to Mr. Downing by 30 for a total of 30
 20 districts, that's within a few hundred dollars of the
 21 amount we requested and that's how we arrived at that
 22 number.

23 There's no question that this was an attack
 24 on Len and that it was aimed at his -- one of his core
 25 constituencies, which is social conservatives, people who

Page 32

1 encourage citizen participation in the political process,
 2 will promote freedom of speech under the U.S. and Arizona
 3 constitutions. Campaigns will become more issue-oriented
 4 and less negative because there will be no need to
 5 challenge the sources of the campaign money. Well,
 6 obviously that goal hasn't been achieved yet based upon
 7 this push poll.

8 Mr. Lang mentioned a goal is to discourage
 9 these people. One way to do that is to give the funds
 10 we're asking for. Even if these people came forward now
 11 and said, Oh, you know, we only called 10,000 people or
 12 15,000 people or whatever the number is, the situation is
 13 different from the Ted Downing situation. It's not -- the
 14 damage can't be undone because it's been spread far beyond
 15 what the calls are already. That's why we're asking for
 16 \$238,838.40, because of that.

17 And, again, that number is arrived just
 18 applying the same standard that the Commission used in
 19 this situation and we think that's the fair number. It's
 20 a lot of money, but that's what it will take to get a
 21 message out to the voters to counteract the message that
 22 was the negative message that was presented. And it's
 23 just -- it's hard for me as an advocate for Len and
 24 somebody who's known him for 20 years to deal with an
 25 issue like this that attacks somebody right at the core

Page 31

1 some information like this would bother. And the fact
 2 that he's having to deal with this in the last days of the
 3 campaign is both personally hurtful and damaging to his
 4 campaign. There's no question about it.

5 And it's true that we can't -- and nobody can
 6 determine the full scope of these calls, but it's clear
 7 they were widespread and, unfortunately, because of the
 8 nature of the allegations, the reports that went out got
 9 spread far beyond just the phone calls that were made.
 10 The newspapers that we're aware of that ran this had a
 11 circulation of 775,000 people on days that they ran. So
 12 it seems -- it seems like a lot of money, but we have to
 13 reach those voters to undue the negative that was done.

14 And this is something I'm sure 10 years from
 15 now Mr. Munsil will get asked about this. Governor
 16 Napolitano was asked about this at a press conference that
 17 she had, so this is something that just wasn't just a few
 18 phone calls and then was no longer an issue. This is
 19 something that's out there in the public domain and will
 20 continue to be out there in the public domain.

21 In my first letter to the Commission -- I
 22 cite -- I do want to repeat the intent of this whole clean
 23 elections system, which is to provide a system that will
 24 improve the integrity of Arizona state government by
 25 diminishing the influence of special interest money, will

Page 33

1 and right in their family, but you can imagine that's
 2 distracting and difficult to deal with when we should be
 3 dealing with a political issue and not personal family
 4 issues.

5 So I thank the Commission for consideration
 6 of this.

7 CHAIRPERSON BUSCHING: Thank you.

8 MR. DRURY: And if you have any questions for
 9 me, I'd be glad to answer them.

10 CHAIRPERSON BUSCHING: Other questions of
 11 Mr. Drury?

12 COMMISSIONER PARKER: I have one. This is
 13 Commissioner Parker.

14 CHAIRPERSON BUSCHING: Go ahead.

15 COMMISSIONER PARKER: What steps would you
 16 take in spending this money to counteract the negativity?
 17 How do you propose to spend the money?

18 MR. DRURY: We would spend it by doing a
 19 phone call to Republican -- high propensity Republican
 20 voters, a radio ad and a television ad, and that's -- and
 21 I understand you don't have this. I apologize for that.
 22 That was set forth in an affidavit from Mr. Noble. And,
 23 by the way, he said the cost of all that would be, I
 24 think, \$302,000. We're not asking for that. We are just
 25 asking the court to apply the Downing standard to our

Page 34

1 situation. That's what we think would be fair.
 2 CHAIRPERSON BUSCHING: Other questions of
 3 Mr. Drury?
 4 COMMISSIONER KUNASEK: Mr. Drury -- excuse
 5 me, Madam Chair.
 6 CHAIRPERSON BUSCHING: Go ahead.
 7 COMMISSIONER KUNASEK: This is for Mr. Drury.
 8 What were the dates that this poll was
 9 allegedly conducted?
 10 MR. DRURY: The people that have caught --
 11 the nine -- well, the 24 people that have contacted us
 12 allege that it was done on Friday, September 1st.
 13 COMMISSIONER KUNASEK: September 1st.
 14 MR. DRURY: Yes.
 15 COMMISSIONER KUNASEK: Okay. And according
 16 to the affidavit from Mrs. -- Ms. Davidson concerning the
 17 next agenda item, the Downing affair, that poll was done
 18 on August 21st to August 23rd. Our order for the Downing
 19 affair was August 30th, so the knowledge was out there
 20 that the Commission was looking into push polls and yet
 21 the issue before us was conducted after the Commission
 22 ruled on the previous complaint. I would have assumed the
 23 organization doing push polls would have known that or
 24 should have or could have and yet they determined to go
 25 forward with it. That's somewhat troubling.

Page 36

1 CHAIRPERSON BUSCHING: Anyone else wish to
 2 speak to this matter?
 3 Sir, come forward and state your name and
 4 limit your comments.
 5 MR. WYMORE: My name is Douglas Wymore. I
 6 represent the Goldwater for governor campaign. We think
 7 it's extremely unfortunate that we're here discussing
 8 this, particularly when it's so close to an election, and
 9 push polls are a problem for a lot of different reasons.
 10 I read the statute and what it appears that they have
 11 asked for matching funds, and we're going to have this
 12 problem, I think, in this state and other states again and
 13 again.
 14 And this is the first time that, I think,
 15 it's been addressed in the state of Arizona on a statewide
 16 campaign where the numbers get so big that you are
 17 considering giving somebody hundreds of thousands of
 18 dollars the week before the election, which certainly can
 19 have an outcome determinative effect on the election. It
 20 encourages people who like one candidate or dislike
 21 another candidate to do something that's going to result
 22 in the candidate they like getting more money. We don't
 23 think that's the case here, but we do think the precedent
 24 should be taken into account.
 25 We don't know who did this. Two of our

Page 35

1 MR. DRURY: Commissioner Kunasek, I'm not
 2 sure which part of that troubles you, but first of all,
 3 this -- the only information we have -- and by the way,
 4 this came from Mr. Goldwater -- was that this was a Texas
 5 company. So I'm not sure -- and I don't know where
 6 Mr. Goldwater got that information and perhaps he can
 7 speak to that today, but whether they knew something that
 8 happened in Arizona the day before, we don't know who did
 9 it, who funded them or why. I think the only thing that
 10 we can determine is this was a professional operation done
 11 in a phone bank kind of way.
 12 There's been some -- you know, I've seen some
 13 innuendo that perhaps we were behind it because we would
 14 benefit from it. All I can say is I just -- we just deny
 15 that in the most categorical terms possible that there was
 16 absolutely no way that our campaign would do this,
 17 especially on a matter so personal to our candidate. So
 18 why -- why that timing, how, you know, we wish we knew
 19 that and we wish we knew who did it, but we don't.
 20 COMMISSIONER KUNASEK: Thank you.
 21 CHAIRPERSON BUSCHING: Thank you.
 22 Are there other questions of Mr. Drury by the
 23 commissioners?
 24 If not, thank you.
 25 MR. DRURY: Thank you very much.

Page 37

1 staffers got phone calls as well, and those phone calls
 2 were blocked. We can give Qwest the information as to
 3 when the phone calls came in and who they were directed
 4 to, but we have no way of going back to track to find out
 5 who did it. Certainly, if we could do that, we would do
 6 that because our view is that this has hurt us as well as
 7 Mr. Munsil. And it's impossible to calculate who it has
 8 hurt more, but it's an unfortunate thing and I think the
 9 Commission has to take some kind of action.
 10 The question is, you know, what is that
 11 action going to be. Mr. Munsil's counsel has told you
 12 that one of the things that you have to take into account
 13 is the news media coverage and the effect. I don't think
 14 that that's exactly true. I don't know the statutes as
 15 well as anybody here at the table, but in reading the
 16 statutes, I noticed that under -- I think it's 16-901.8,
 17 news media coverage is not viewed as an expenditure. So
 18 what you have to do is I think you have to step back and
 19 you have to say what are we going to match; what was the
 20 expenditure in this particular case.
 21 And I think that Mr. Lang has tried to do
 22 that in his calculations, but I think what we know at this
 23 point in time is that there were phone calls made on one
 24 day. We don't have any reports of any phone calls made on
 25 any day other than September 1st. We don't know how many

Page 38

1 people made those phone calls. We don't know who they
 2 were made to. We just know that there's approximately 20
 3 to 30 people that received them. We know that those
 4 people are saying they heard something in the background,
 5 but we don't know whether what they heard is calls to
 6 other people on the same issue or not.

7 That puts you in a very difficult situation
 8 because if you are awarding money to somebody or matching
 9 funds and you have no way of knowing what the costs were,
 10 who they were made by and how many people they reached,
 11 what you're, in essence, doing is guessing. And that
 12 guess can certainly be wrong, and that wrong guess can
 13 then, in this particular instance or another one in the
 14 future, affect the outcome of an election.

15 And we're talking about our governors here
 16 and we're talking about a lot of money, probably -- I
 17 guess the original estimate was 30 percent or so or
 18 actually more than that -- 60 percent of his original
 19 matching funds. Even with what he's requesting today,
 20 it's probably 50 percent of his original matching fund.
 21 So we're talking about a very large amount of money, and
 22 you don't know how many people were called.

23 Nonetheless, push polls are a problem.
 24 They're a problem for the Goldwater campaign. They're a
 25 problem for the Munsil campaign at this point, and they're

Page 40

1 therefore, you must be the dirty bird. We can't conduct a
 2 poll. On this short notice, we can't tell you who the
 3 grievied party is but what we can tell you is the statutes
 4 don't let you say the news media did this and they
 5 disseminated it out.

6 If you go to matching funds, I think you are
 7 restricted to saying these are the people reached in this
 8 period of time and this was the cost of those phone calls,
 9 and that's how you determine matching funds.

10 Do you have any questions?
 11 CHAIRPERSON BUSCHING: Thank you.
 12 Are there questions of Mr. Wymore?
 13 Commissioner Jolley.
 14 COMMISSIONER JOLLEY: Yes, I have a question.
 15 Could you tell me approximately what you
 16 think is the time frame to sign a contract with a push
 17 poll or a company that does push polls? I mean, could you
 18 call someone on August 31st and they can get all the
 19 information ready to go on September 1st?

20 MR. WYMORE: Well, if you have a legitimate
 21 company, then you can sit down and say that's a matter of
 22 negotiation. If this is six people in a room that decided
 23 to do this on their own and start calling people because
 24 they got some information, then it would be impossible to
 25 answer. So the only thing I can give you is conjecture

Page 39

1 going to be a problem in the future. I don't know how to
 2 address that, but one of the ways is if you do give
 3 matching funds to somebody, it ought to be calculated to
 4 undo what the problem was and to reach the audience that
 5 it reached. I don't think you can sit here and
 6 extrapolate out and just say wily-nilly we decide it's
 7 this amount.

8 You have to have some evidence to go forward,
 9 and here we are basically one week after this thing
 10 occurred without anybody being able to investigate what it
 11 was and then asking for a bunch of money. If you award
 12 it, then in the next election if there are three push
 13 polls the week before the election and the governorship is
 14 at issue or other things are at issue in this state, then
 15 you've established a precedent where you're going to give
 16 the candidates that you find to be grievied more money.

17 And you can't control what people are going
 18 to do. We all have to live with dirty campaigning. It's
 19 unfortunate. That's why you're here. The best thing in
 20 the world would be if we can clean it up, but we don't
 21 want to encourage it either.

22 We're not asking for funds. We understand
 23 that there's been some damage done. We think the damage
 24 has been more directed at our campaign because the news
 25 media said, Well, you're associated with this so,

Page 41

1 because we don't know who the firm was. There was some
 2 talk that we knew it was a Texas firm. We don't know who
 3 it is. We -- we don't know. If we knew, that would be so
 4 much easier for us all.

5 CHAIRPERSON BUSCHING: Are there other
 6 questions of Mr. Wymore?
 7 Thank you, sir.
 8 Oh, I'm sorry.
 9 COMMISSIONER KUNASEK: No, I don't have a
 10 question. It's just a comment on your statement about
 11 news media. It's not an expenditure but it sure is
 12 effective.

13 MR. WYMORE: It sure is and, I mean, that's
 14 one of the problems with the statute the way that it's set
 15 up. It is very effective and, basically, 30 phone calls
 16 can lead to news media accounts, and I believe the Munsil
 17 campaign issued a press release and then, of course, that
 18 gets the news media going as well and what were they
 19 supposed to do. Sit down and do nothing? You know,
 20 you're caught between a rock and a hard plate.

21 CHAIRPERSON BUSCHING: Thank you, sir.
 22 COMMISSIONER KUNASEK: Thank you.
 23 MR. WYMORE: Thank you.
 24 CHAIRPERSON BUSCHING: Is there anyone else
 25 from the public that wishes to speak to this matter?

Page 42

1 Sir?

2 MR. GORDON: Madam Commissioner,
3 Commissioners, Andy Gordon, and I would like to speak to
4 this. As I'm sure this Commission is well aware, I do not
5 represent any of the candidates involved in this and
6 haven't frankly given a lot of thought to push polling
7 until I overstated this of week before the Commission.

8 There -- but let me tell you what our bottom
9 line concern is to the danger we foresee here. Assuming
10 this is a push poll, and that is, it's express advocacy
11 and not legitimate polling, the amount of money that the
12 Commission awards has to be based upon the amount of
13 expenditure that was incurred in the push poll under the
14 statute. And if the Commission gets it wrong and awards a
15 significant amount of money, it may well impact the
16 outcome of an election.

17 There's no particular -- I don't care who
18 wins this primary election, but there are other elections
19 we're concerned with. And as is now apparent from the
20 Downing matter, you cannot extrapolate the number of calls
21 made from the reports of calls. As we now know in that
22 matter, 208 calls were made. This raises the possibility
23 of real political dirty tricks.

24 It's tough enough to deal with push polls as
25 they are, but the fact of the matter is if someone wants

Page 43

1 to create real havoc, they would make 4- or 500
2 well-placed calls. You figure out who are the
3 high-advocacy voters, call them because you know those are
4 the people who are most likely to call the Munsil campaign
5 or the Goldwater campaign or, in our case, the Napolitano
6 campaign and then all hell breaks loose. And then someone
7 comes down and asks for a very large amount of money, and
8 that can impact the outcome of a campaign.

9 You can't just guess based on these kind of
10 extrapolations. I'm sure both Todd's statistics professor
11 and my statistics professor are probably spinning thinking
12 about these kind -- there's no statistical basis for
13 making these kind of guesses. There's also a more subtle
14 problem of work here, and that involves whether or not
15 something is a real poll or a push poll.

16 Now, I have to tell you having listened to
17 this discussion, if all these calls are made on a single
18 Friday night on Labor Day weekend, it's probably fair to
19 guess that this was a push poll. Most real polls, you do
20 over the course of two or three nights; you probably avoid
21 holiday weekends, but as we now know from the Downing
22 matter, that was a very brief real poll.

23 The difficulty here is, as I've always read
24 the regulations and the other guidance put out by the
25 Commission, if an IE engages in a real poll, that is not

Page 44

1 an event that you need to disclose at the time the event
2 is made because I didn't know that anyone assumes a real
3 poll constituted advocacy. And so even assuming the
4 people -- if it was a real poll, I don't know that someone
5 would disclose that. Now, once they made the expenditure
6 here, a disclosure should have been made if this was a
7 push poll rather than -- rather than a real poll.

8 The fact is it can also be a push poll that
9 doesn't cost any money. It is possible that this are a
10 volunteer phone bank, just people who really dislike
11 Mr. Munsil and they get together and they just organize
12 themselves and do this one night. That would not entitle
13 Mr. Munsil to any money because there's no expenditure
14 within the definition of the statute.

15 There are huge unknowns here and to make a
16 significant award of money under these circumstances is a
17 very -- as the fellow on behalf of Mr. Goldwater says, a
18 very, very dangerous precedent. It is also, I think,
19 worth noting that it is unlikely that calls were made to
20 that many people. You were talking -- you know, the
21 Commission has these live calls based \$0.72 a call, Todd,
22 I think -- to be honest with you, I wish I could find live
23 callers who would do it at \$0.72 a call.

24 And so that's -- in a real poll, in a short
25 real poll like in the Downing matter -- I don't think this

Page 45

1 is in what I gave Todd -- there were 209 calls made and
2 the call -- the people who actually made the call, that
3 company, was given \$400. It works out to almost \$2 a
4 call, and that was very, very brief.

5 Statewide campaigns don't engage in this kind
6 of live push calls because it costs too much money. When
7 you've got the limited amount of money we have under clean
8 elections and you can do a piece of direct mail for \$0.35,
9 you can do -- the Commission knows what a robo call is.
10 Those are those annoying prerecorded calls we get. Those
11 cost five, seven, eight cents per call. It is -- it is
12 very unlikely that it goes to this vast number of voters
13 because it's not economical.

14 I am -- let me conclude, again, by saying I'm
15 very concerned by the precedent and mischief this costs
16 particularly at a high-stake statewide race. If the
17 Commission does this, a sophisticated independent
18 expenditure committee could do a very few number of calls
19 on a very outrageous subject, which is what this subject
20 was here, calling in to question Mr. Munsil's past,
21 trigger a huge furor and then get that candidate a
22 terrific amount of money. And that's a -- that's a really
23 dangerous thing to do.

24 So I appreciate the Commission listening to
25 me yet one more time. If there are any questions, I'd be

Page 46

1 glad to answer them and if not --

2 CHAIRPERSON BUSCHING: Commissioner Kunasek.

3 COMMISSIONER KUNASEK: I enjoy listening to
4 you. I'm glad you came back. I was worried what you were
5 here for.

6 The issue -- you mentioned a couple of things
7 that I made note of. One, you didn't mention, but I'm
8 going to ask anyway. You know, these all came about on
9 the holiday weekend, a very short time frame for any
10 campaign to react to get to count them and they're asking
11 for a significant amount of money. I think Todd in his
12 calculations presents a reasonable figure to open with. I
13 guess my question boils down to, as we experienced in the
14 Downing affair, how do you smoke these people out?

15 What -- what way do you -- to try and get
16 this cleaned up so that any group of two or three or four
17 or six get together and think I want to help this
18 candidate and the way I can help this candidate is we'll
19 put out a message about the other candidate to harm him.
20 And it might be, as you say, a totally amateur, no
21 contracts, nothing, but how do these people that would
22 think of setting down to do that learn that they better
23 not do it or it's going to hurt their candidate?

24 MR. GORDON: Madam Chairman, Commissioner
25 Kunasek, that's a great question. What I think -- I think

Page 48

1 goes out and says -- calls 3- or 400 high-efficacy voters
2 and say would you vote to re-elect Governor Napolitano if
3 you knew that she was going to let all the prisoners go,
4 you know.

5 Okay? Now, I mean, people say she's going to
6 do that all the time, anyway, but it looks pretty ugly,
7 but would a candidate take that risk to get a couple
8 hundred thousand dollars in matching funds particularly on
9 the eve that -- there is no way if you all get it wrong --
10 there is no way to unring this bell.

11 So any other questions?

12 CHAIRPERSON BUSCHING: Other questions for
13 Mr. Gordon?

14 COMMISSIONER KUNASEK: Thank you.

15 CHAIRPERSON BUSCHING: Mr. Gordon, I heard
16 you make a lot of comments, but if you were sitting in my
17 seat, what would you say should be done?

18 MR. GORDON: Well, I think it's pretty clear
19 that I won't be, so it's pretty easy for me to make it. I
20 wouldn't award any money in this case, to be honest with
21 you. I do not believe, based on the facts you have, that
22 there's a sufficient factual basis regarding the number of
23 calls or the cost of those calls because despite what
24 Mr. Drury said about trying to cover the cost of the
25 damage, clearly all the Commission is entitled to award by

Page 47

1 it's fair to say that most people know I don't think this
2 statute is a model on how these things ought to be done.
3 What I think should happen with the IE's is that at the
4 moment they make any expenditure, whether it constitutes
5 advocacy or not, there be a reporting requirement so there
6 is total -- what's the word?

7 COMMISSIONER KUNASEK: Disclosure.

8 MR. GORDON: Total disclosure, instantaneous
9 disclosure and, secondly, that there be very significant
10 penalties for people who don't do it to scare the
11 "bigeebers" out of them the next go-round. That is how I
12 would solve the problem. It also deals with the infinite
13 First Amendment problems we face in this situation, but
14 that's how I'd do it because, otherwise, what happens, as
15 I'm saying over and over again, is someone very
16 sophisticated comes in, triggers a big amount of money and
17 may actually benefit. They may decide that the hit that a
18 given campaign -- let me give you an example.

19 Let's say there are rampant rumors about a
20 public official's -- it's been out there for years, okay.
21 You say, okay, the public kind of knows that, anyway;
22 we'll do what looks like a push poll on that issue, pretty
23 ugly stuff, in the hopes that it will trigger a large
24 amount of matching funds for that candidate. And that's a
25 real, real danger here. I mean, if, for instance, someone

Page 49

1 way of matching funds is the amount of the expenditure
2 made. That's, I think, very clear under the statute, and
3 you simply don't have a factual basis for making that.

4 Madam Chair, if, for instance, you had to
5 defend this in Superior Court, would there be a sufficient
6 factual basis to uphold this, and I don't think there is.
7 I mean, I know it's ugly and I know it's tough, but
8 there's no -- there's no basis at this point.

9 CHAIRPERSON BUSCHING: Okay. Thank you.

10 Other questions of Mr. Gordon?

11 If not, thank you.

12 MR. GORDON: Thank you.

13 CHAIRPERSON BUSCHING: Is there anyone else
14 from the public that wishes to speak to this matter?
15 Sir?

16 MR. MADDOX: Thank you.

17 David Maddox for the Munsil campaign, also.
18 We're honored that the Governor sent somebody to this.
19 We're also pleased that Mr. Goldwater is here today, but
20 most importantly, I'm thankful for the Commission taking
21 this up so quickly.

22 The last couple of speakers have just
23 completely diverted the attention from the harm and
24 completely diverted the attention from the purpose of the
25 statute. The purpose of the statute is to deal with

Page 50

1 something that's done that could be outcome-determinative
2 in an election where something was done wrong. And here
3 we've got an awful situation ended up on the front pages
4 of newspapers and went out all across the state.

5 I notice that Mr. Goldwater's representative,
6 just writing down a couple of things, said undue the harm
7 and he said reach the audience that it went to. The
8 governor's representative said something about you can't
9 unring the bell. Well, that may be, but if the Commission
10 just sits here and does nothing, the end result is that
11 Mr. Munsil is sufficiently damaged at the very core of his
12 constituency in ways that have been demonstrated. I mean,
13 we have clearly demonstrated in the newspaper articles,
14 et cetera, along with the affidavits, the extent of the
15 damage.

16 Now, the comment was made that if this was in
17 a Superior Court. Well, fine. If this was in a superior
18 court, as a trial lawyer I know exactly what kind of
19 evidence you'd have. You'd also have the ability to go
20 chase it down. You'd have the ability to have subpoenas
21 and you'd have time, but we don't have any of those
22 things. So what we are all in a position of doing is
23 looking at the evidence before us and making our best
24 judgments on what is appropriate under the statutes.

25 And I certainly compliment Todd, although I

Page 52

1 established to come up with the \$230,000 number, which
2 would not be a number that would make it all right but
3 would at least level the playing field. We presented to
4 you an affidavit about how that money would be spent.

5 I wanted to address one other issue that was
6 raised, the question of absentee ballots. You are
7 absolutely correct, and that number is available. I don't
8 know it off the top of my head but, I mean, absentee
9 ballots have been cast. The problem it presents for the
10 Munsil campaign is we don't know who these people are. So
11 if we're making phone calls, we can't take a list and just
12 mark them off and say these people have voted and how they
13 voted. So we have to just make phone calls.

14 You know, there is no time -- and I don't
15 even know, and I'm being quite honest about this. So
16 somebody smarter than me is going to have to come up with
17 the answer whether that information could be obtained. I
18 doubt it. I certainly don't think it should be obtained.

19 There have been some questions about what you
20 do next. I would hope -- and I noticed in your rules,
21 we're going to be presenting to you guys some suggestions
22 down the road for amending this statute. I agree that the
23 statute as it's currently worded doesn't work. The
24 Goldwater campaign and the filings they made suggested
25 that we all join together and try to get the Attorney

Page 51

1 think his number is low, in that, in fact, that he's done
2 that. He went out and did some statistical analysis and
3 has come back with a -- with a recommendation. You know,
4 we cannot, in this short of period of time, canvas the
5 hole state and bring affidavits in. It's impossible.

6 So to that extent, the push poll has been
7 successful. We know that the effect was statewide because
8 of the newspapers. We also know the effect was statewide
9 because the Governor, when she was asked about this, was
10 in Washington, DC. So, I mean, the effect -- and I
11 recognize what the statute says, but the effect is
12 statewide. You have to make your best judgment based on
13 statistics and what happened.

14 Now, we have pointed out that we sent out --
15 and I don't remember the numbers, but they're in the
16 information you've received -- something like 45,000
17 mailings and got six calls and, in this instance, we got
18 24 calls. Well, if you want to use that as a way, that's
19 as good a way as any way to take a look at what we're
20 looking at in the effort. How much damage has been done.
21 Well, again, considering -- since you are weighing things,
22 I mean, we had Mr. Noble present an affidavit. If we were
23 going to fix it, it would cost over \$300,000.

24 Well, we're not asking for \$300,000. We were
25 using the formula that you, yourselves, originally

Page 53

1 General to find out. Believe me, we're perfectly willing
2 to do that. The problem is we've got an election on
3 Tuesday, and the question is how do we level the playing
4 field.

5 And if you do what the Governor wants, you
6 know, or what Mr. Goldwater is suggesting, then in effect
7 you've just condemned Mr. Munsil. And that is not what
8 the statute is intended to do, and that's certainly not
9 what this Commission has done. You guys have gotten a lot
10 of criticism at times and the decision that you made
11 regarding the Governor, there was a lot of criticism done.
12 Well, this is my third appearance before you, and I have
13 to say that I have been impressed with the diligence that
14 you've made in trying to not only follow the statute but
15 understand the effect that your decisions have on races.

16 I mean, you can always look at something, you
17 know, is the glass half full or is it half empty. If you
18 want to look at it from the fact that there might be
19 somebody out there that will do dirty tricks in the future
20 and make your decision based on that, that's not what the
21 statute was designed to deal with, what might happen in
22 the future. The statute is designed to deal with on the
23 basis of what happened now.

24 And Mr. Lang has given you some information.
25 We've given you everything we could possibly give in a

Page 54

1 short period of time. There's a limit on what even we can
 2 do. We can't even buy cable if we have the money. I
 3 mean, there's a limit on what we can do, which means you
 4 have to do some things that may cost more than otherwise
 5 to try to just level the playing field. And that's all
 6 we're asking you to do is give us a chance to level the
 7 playing field based on what you are allowed to do and
 8 based on your precedent before.

9 So, again, I thank you for your time.

10 CHAIRPERSON BUSCHING: Thank you, Mr. Maddox.

11 Other questions of Mr. Maddox?

12 MR. MADDOX: Thank you very much.

13 CHAIRPERSON BUSCHING: Thank you.

14 Is there anyone else from the public that
 15 wishes to speak to this matter?

16 Sir?

17 MR. BAILEY: My name is Michael Bailey. I
 18 just want to respond briefly to some of the comments of
 19 Mr. Gordon.

20 He's asking you to consider your precedent,
 21 and I just want to point out again, if we can expand a
 22 little bit, whatever you do today is a precedent. Now, he
 23 raises the issue possibly of campaigns basically nuking
 24 themselves by saying something but, you know, I want to
 25 point out you don't need to leave --

Page 56

1 Thanks.

2 CHAIRPERSON BUSCHING: Other questions of
 3 Mr. Bailey? No? Okay.

4 Is there anyone else from the public that
 5 wishes to speak to this matter?

6 If not, then we'll turn back to the
 7 commissioner.

8 Mr. Lang, before the Commission goes into
 9 deliberations, do you have anything further you want to
 10 tell us or do you still stand on your original
 11 recommendation based upon the comments?

12 MR. LANG: I answer yes to both, Madam Chair.
 13 May I?

14 CHAIRPERSON BUSCHING: Please.

15 MR. LANG: First of all, I want to thank all
 16 the speakers. I know the Commission shares this view that
 17 they were all remarkably helpful and interesting, and it's
 18 interesting I believe all of them and yet their views are
 19 so different. It shows what a tough issue this is, but I
 20 wanted to address some of the concerns raised.

21 Mr. Wymore, on behalf of the Goldwater
 22 campaign, I share many of his concerns and I want to make
 23 it clear. And I think I've already said this, but I
 24 believe Don Goldwater when he tells us his campaign had
 25 nothing to do with it. And I believe that and I

Page 55

1 COMMISSIONER SCARAMAZZO: Hello.

2 COMMISSIONER JOLLEY: Hello.

3 CHAIRPERSON BUSCHING: You're here.

4 COMMISSIONER SCARAMAZZO: Okay. Thanks,
 5 guys. I just keep losing you.

6 CHAIRPERSON BUSCHING: Okay.

7 MR. BAILEY: You don't need to leave and I'm
 8 sure you haven't left your common sense out in the hall or
 9 back in the back. Nobody is going to put something out
 10 that really damages them. Whatever the line about letting
 11 all the prisoners out is, in this case you are dealing
 12 with a candidate who has the support of a certain group of
 13 people and there's information out there that tends
 14 clearly to take that support away. You will be able to
 15 figure out down the road what hurts, what doesn't. I
 16 mean, it's clear. This -- nobody would do this on their
 17 own.

18 And so you are setting a precedent today, but
 19 the precedent works in both directions. If you do
 20 nothing, you open the door for every campaign and every
 21 race to get the news out this way within the community.
 22 And, in fact, in response to Commissioner Kunasek's
 23 question, the only way that you can stop it is to stop it
 24 with the kind of force that says this really doesn't pay
 25 and that's what, you know, you ought to do.

Page 57

1 understand why he's upset about this, and I do think --
 2 and I mention this in my recommendation, the last
 3 sentence. I said that this has to be a case-by-case basis
 4 and not strict precedent because people might try to gain
 5 the system and trigger matching funds in the way that
 6 Mr. Gordon alluded to.

7 I think that may happen, but I also agree
 8 with the last speaker, Mr. Bailey. That shouldn't deter
 9 the Commission ultimately from doing what is necessary
 10 here, and I think what's necessary here is not complete
 11 equalization, not a perfect response because, as
 12 Mr. Gordon alluded to, the facts are not 100 percent
 13 understood but we need to give the Munsil campaign some
 14 opportunity to respond in some significant way but we do
 15 need to be also conservative in this estimation because of
 16 the danger of overpaying that Mr. Gordon alluded to.

17 He said -- Mr. Gordon said that this -- that
 18 the decision of the Commission may impact the election.
 19 Well, I agree with that, but failing to award money after
 20 a hit piece like this may impact the election and may
 21 trigger more such hit pieces. I'm very concerned about
 22 that. These political dirty tricks are -- I can't think
 23 of anything that upsets me personally more. You know what
 24 I'm trying to do on this job and what staff is trying to
 25 do.

Page 58

1 I know we were all alarmed about this and we
2 know that they'll continue and will continue to gain the
3 system and we'll try to take that on. We'll do our best
4 to evaluate those, but I think the policy questions is
5 should we just allow these tricks. And I think when you
6 look at what this definition of express advocacy is and
7 when you look at the definition of expenditure, I don't
8 think the Commission has -- I think that the requirements
9 are fairly clear that this needs to be matched in some
10 fashion.

11 I think where the Commission has a lot of
12 leeway and discretion is in how much. And it may be less
13 than 80,000 is appropriate because of the concerns about
14 the statistics and the numbers because we don't have exact
15 funding, but I think at the same time, there's a
16 legitimate reason why we need to award more than -- why
17 the Commission could award more than 80,000. So
18 ultimately, I think 80,000 is a fair estimate. It gives
19 them a significant amount of money to respond, but if it
20 turns out to be wrong, unless it's less harmful than the
21 greater amount that they're asking for.

22 You know, Mr. Gordon also mentions the
23 solution is having all the issued groups file reports
24 right away, whether it's express advocacy or not, and I
25 agree with him a hundred percent. That's outstanding, but

Page 59

1 Peter would hate it because there would be a definite
2 lawsuit and folks would contend that their constitutional
3 rights are being infringed upon. So I think that's a
4 dangerous way to go, but ultimately I do agree with him.
5 It's a great resolve, but I know Peter doesn't want to
6 have to deal with another lawsuit. He has plenty.

7 So given all that, I stand by my
8 recommendation. I think it's the appropriate amount. And
9 I think there are good arguments why it should be lower
10 and I think there are good arguments why it should be
11 increased, but ultimately I think 50- to 80,000 dollars is
12 the appropriate amount. There has to be some opportunity
13 for the Munsil folks to respond.

14 CHAIRPERSON BUSCHING: Thank you.
15 Are there any questions of Mr. Lang?

16 Now, considering the fact that we have two
17 significant issues here, one is whether there should be
18 some matching funds and the second of how much, I think
19 that as we go into deliberations, it may make sense to
20 break this matter down into two different motions. And if
21 the first motion is one to provide matching funds, then we
22 can move on to a second motion of how much in matching
23 funds.

24 And with that, I'll open it up for discussion
25 or a motion.

Page 60

1 Commissioner Jolley.

2 COMMISSIONER JOLLEY: Yes. Well, I don't
3 want to discuss anything further. So can I make the
4 motion?

5 CHAIRPERSON BUSCHING: Sure.

6 COMMISSIONER JOLLEY: Okay. Well, I will
7 make a motion that in the campaign of Len Munsil, a
8 participating candidate, that the Commission finds that
9 the phone calls contain express advocacy and constitute an
10 independent expenditure against Mr. Munsil.

11 CHAIRPERSON BUSCHING: Okay.

12 COMMISSIONER KUNASEK: Second.

13 CHAIRPERSON BUSCHING: It's been moved by
14 Commissioner Jolley and seconded by Commissioner Kunasek
15 that the push poll constitutes express advocacy for Len
16 Munsil.

17 Any further discussion?

18 COMMISSIONER KUNASEK: Against.

19 CHAIRPERSON BUSCHING: Against. Thank you
20 for the clarification. Yes, against Len -- I was reading
21 here.

22 Any further discussion? If not, the Chair
23 will call for the question, and let me just restate the
24 motion again so that our record is clear; that the motion
25 is that the push poll that was conducted constituted

Page 61

1 express advocacy against Len Munsil entitled -- which --
2 well, against Len Munsil.

3 All in favor say aye.

4 (Chorus of ayes.)

5 CHAIRPERSON BUSCHING: All opposed nay.

6 The chair votes aye.

7 Commissioner Parker, did you vote?

8 COMMISSIONER PARKER: Yes, I voted aye.

9 CHAIRPERSON BUSCHING: Thank you.

10 The Chair votes aye. The motion carries.

11 Okay. Then let's go to the question of the
12 amount of funds to be awarded to Mr. Munsil. I open it up
13 for discussion.

14 COMMISSIONER KUNASEK: Madam Chairman?

15 CHAIRPERSON BUSCHING: Commissioner Kunasek.

16 COMMISSIONER KUNASEK: I respect the work

17 that Todd has been doing and in my short time on this
18 body, I am impressed with his analysis that he uses and
19 the explanation as to what went into that analysis. And
20 based on our experience last week -- or the last week, I
21 guess, and hearing the discussion today, I kind of equate
22 this to a topic that I have a long bit of experience with
23 called drug abuse. This is kind of like drug abuse. It's
24 kind of addicting. If this thing is let go on, it's going
25 to be overwhelming.

Page 62

1 I kind of look at the award as a flash money.
 2 As we know, when the police are out there trying to catch
 3 these guys, they have a pocket full of money and they use
 4 that to smoke them out -- is the term I use with
 5 Mr. Gordon. And that's how I look at this, this
 6 recommendation. Is it enough? Probably not. Is it too
 7 much? Probably it could be, but I think we have to start
 8 someplace. And if we don't begin to get the message out
 9 to the perpetrators, whether they be hired or
 10 volunteering, that their action is going to cost somebody
 11 dearly -- and so I would support Todd's recommendation of
 12 \$80,000.
 13 COMMISSIONER SCARAMAZZO: I will second that.
 14 COMMISSIONER KUNASEK: Well, I haven't made
 15 the motion yet, but I will.
 16 COMMISSIONER SCARAMAZZO: I thought -- I
 17 thought you were so eloquent that it as built in.
 18 COMMISSIONER KUNASEK: It was implied.
 19 CHAIRPERSON BUSCHING: It's been moved and
 20 seconded.
 21 COMMISSIONER KUNASEK: I'll make the motion.
 22 CHAIRPERSON BUSCHING: Okay.
 23 COMMISSIONER KUNASEK: I would -- I would
 24 move that we adopt Todd's recommendation of \$80,000 in
 25 matching funds.

Page 64

1 All in favor of awarding Len Munsil \$80,000
 2 in matching funds as a result of the push poll survey say
 3 aye.
 4 (Chorus of ayes.)
 5 CHAIRPERSON BUSCHING: Oppose, nay.
 6 The Chair votes aye. The motion carries.
 7 Commissioner Parker?
 8 COMMISSIONER PARKER: Yes.
 9 CHAIRPERSON BUSCHING: Once again, I'm sorry.
 10 I didn't hear your vote.
 11 COMMISSIONER PARKER: I said aye.
 12 CHAIRPERSON BUSCHING: Okay. Thank you.
 13 And the motion carries.
 14 Item VI, consideration whether to reconsider
 15 issuance of matching funds to Ted Downing for push poll
 16 and possible action.
 17 Commissioner Parker?
 18 MS. MURPHY: Commissioner Parker?
 19 Commissioner Parker?
 20 CHAIRPERSON BUSCHING: Commissioner Parker?
 21 MS. MURPHY: Commissioner Parker, I'm going
 22 to call Paula Aboud.
 23 (Whereupon, a recess was taken in the
 24 proceedings.)
 25 CHAIRPERSON BUSCHING: All right. I will

Page 63

1 CHAIRPERSON BUSCHING: Okay. And that's a
 2 second, Commissioner Scaramazzo?
 3 COMMISSIONER SCARAMAZZO: Correct.
 4 CHAIRPERSON BUSCHING: Okay. It's been moved
 5 and seconded that we adopt the Executive Director's
 6 recommendation that we award \$80,000 to the Len Munsil
 7 campaign.
 8 Further discussion?
 9 I just want to say, Commissioner Kunasek,
 10 that I agree with everything that you say. This is a very
 11 difficult situation. I don't like the idea of these
 12 polls. I would like to have people brainstorm and see
 13 what we can do to nip them in the butt, so to speak, so
 14 that it doesn't become a regular thing. I think that
 15 \$80,000 may be too much, may be too little, as you said.
 16 And I'm troubled by the fact that we have to
 17 do it at all, but I think that under the circumstances, if
 18 we don't do something, it's sending the wrong message as
 19 well and, that is, you can do these kinds of things and it
 20 will not have an effect on the candidate you are trying to
 21 harm; that they will not be entitled to matching funds at
 22 all and I don't think that's a good result either. So I
 23 am in support of the motion as well.
 24 Any other comments before I call for the
 25 question? If not, the Chair will call for the question.

Page 65

1 note for the record that Commissioner Parker is still on
 2 the phone. Commissioner Scaramazzo has had technical
 3 difficulties and so will not be with us for this agenda
 4 item, and we have Ms. Aboud on the teleconference as well.
 5 And I will turn to Mr. Lang.
 6 MR. LANG: Thank you, Madam Chair,
 7 Commissioners.
 8 I note that Senator Aboud and representative
 9 Downing are both here, and I certainly appreciate their
 10 efforts to be here. This is a tough issue. As you
 11 recall, last week we considered this matter and it was
 12 very similar to the matter you just discussed. It was
 13 what we thought to be a nefarious push poll and, based on
 14 that, the Commission awarded matching funds under my
 15 recommendation of \$7,974.
 16 Since that time under the theory we have,
 17 which is issue matching funds and sometimes folks will
 18 come forward, that happened in this case. And the folks
 19 at Media Guys, Inc., a political consulting firm, one of
 20 them came forward. We have an affidavit from
 21 Ms. Davidson, Michelle Davidson, of Media Guys. And in
 22 her affidavit, she indicates this was not a push poll;
 23 that it was done on behalf of Protect Tucson Women, an
 24 independent expenditure committee. And they called about
 25 200 people, which makes it much cheaper than what we

Page 66

1 estimated.

2 They completed 209 calls. They were testing
3 messages from a mail piece and -- according to her
4 affidavit, and did, in fact, do a mail piece that, I
5 guess, is going out today. And that mail piece is as
6 Exhibit C, I believe, and you'll notice, of course, that
7 the mail piece has nothing do with those messages. It's a
8 positive endorsement of Senator Aboud, and it has nothing
9 to say about representative Downing. I'm told that the
10 reason for that is because their messages -- it is no
11 surprise to me, at least -- tested negatively. They did
12 not get a good response. So that's the background here.

13 I'd also point out that I misspelled the word
14 paid in the background. So if you can correct that, it's
15 p-a-i-d, of course. I hate that.

16 And so based on that, based on the fact that
17 we have exact numbers of exactly how much was spent, I'm
18 asking that the Commission -- or I'm recommending that the
19 Commission ask for the difference to be reimbursed by the
20 Downing campaign back to the Commission. That difference
21 is \$3,415.44.

22 There is one sort of difficult question, and
23 that is whether the poll, which you can see is \$1,500 --
24 whether that constituted express advocacy because polls
25 are designed to get information for a later expenditure.

Page 68

1 know, it's difficult for anyone, and I understand why
2 representative Downing would be grieved. I think the
3 proper result is to ask for the money back if he still has
4 it, and so that's my recommendation in this case.

5 CHAIRPERSON BUSCHING: Thank you.

6 Are there questions of Mr. Lang?

7 Is there anyone from the public that wishes
8 to speak to this matter?

9 Sir, come forward and state your name,
10 please.

11 MR. DOWNING: Thank you.

12 CHAIRPERSON BUSCHING: And as I indicated
13 earlier, comments are limited to 10 minutes.

14 MR. DOWNING: Okay. Thanks. Does that
15 include questions of me? I'm sorry.

16 CHAIRPERSON BUSCHING: No.

17 MR. DOWNING: Okay. Thank you.

18 Okay. Thank you very much. For the record,
19 I'm Ted Downing, state representative and a candidate for
20 Legislative District 28. Just for clarification, I would
21 say it's unfortunate that witnesses that were here in the
22 previous hearing improperly characterized the facts into
23 what happened in my case. I don't know what we do about
24 that. I don't know the procedures in the Commission, but
25 there was a lot of discussion trying to characterize the

Page 67

1 We already recommended that the nature of the questions
2 made them express advocacy, and although this is a tough
3 question and won't always go this way, I think in this
4 case it should still count as express advocacy because
5 they were negative and so they should be deducted.

6 I think there's a legitimate argument and I
7 think it's -- a secondary argument that Mr. Downing might
8 make -- I'm sure his primary argument is no money should
9 be refunded, but his secondary argument would be that
10 shouldn't be counted towards the refund because it was not
11 express advocacy. It was simply a poll, but that's up --
12 you know, I don't want to put words in his mouth.

13 I will say, to be fair to Mr. Downing, he
14 approached us in good faith and was deeply concerned about
15 this poll, and I would certainly understand why he would
16 believe -- and he may have already expended this money.
17 According to our last check of the reports, that's not the
18 case, but I can certainly -- you know, what we don't want
19 to have happen as a staff as a matter of policy is that
20 these decisions disrupt their campaigns. And he may well
21 have already allocated the money.

22 So there are good arguments as to why he
23 should not have to refund the difference but, also, to be
24 fair to Senator Aboud, we do have the proper numbers. And
25 so I think the proper result, though I -- frankly, you

Page 69

1 facts that you were hearing. So, essentially, the water
2 has been muddied even before I come for my 10 minutes.

3 What I'm concerned about and the -- is the
4 sequence of events. First, let me state that I operated
5 in total good faith, as Todd said. I had a push poll on
6 me. I would ask of the Commission, if you haven't heard
7 that push poll, it will take two minutes to run it. It's
8 been characterized as not a push poll. I have it right
9 here in my laptop. You can listen to it and make your own
10 judgement.

11 CHAIRPERSON BUSCHING: We heard it at the
12 last meeting.

13 MR. DOWNING: Okay. You heard it at the
14 least meeting. Okay. That's express advocacy and it
15 didn't -- and it did, as a push poll does, introduce,
16 inject information about my character -- characterizing my
17 position on the spousal rape of women, which was
18 incorrect. And so it was tainting the water and asking
19 for express advocacy for the election of my opponent.

20 That was first, and we operated in good faith
21 and your staff requested that if we can find any
22 information, we register it and who was doing it to bring
23 it forward. There's a sequence of events here and some
24 timelines that are real critical. The critical timeline
25 is that we brought information to the Commission

Page 70

1 indicating that Media Guys was the source of this push
2 poll, from our perspective. We had no -- we weren't
3 certain. We absolutely didn't have a certainty because I
4 don't have subpoena power.

5 It's only at that point that the Commission
6 requested from Media Guys and it's only at that point that
7 they decided to disclose. I think that's critical. That
8 sworn statement comes after we brought this information to
9 your staff. I don't think my campaign should be punished
10 for trying to up the Commission understand who was
11 responsible for this and, in the process, we had argued
12 earlier that there was -- actually was more.

13 We had done some of our estimates and we
14 thought -- we had no idea what the universe was and I
15 still don't think we know because Media Guys in their
16 sworn statement did not fully disclose to you who actually
17 paid and they've never provided a list, to my knowledge,
18 of who they actually called. And we would like to see
19 that list, but there's still obfuscation going on because
20 even in their sworn statement, they didn't -- they try to
21 defend it saying this is not a push poll, if that's what
22 they said.

23 You heard the -- you heard the poll. You can
24 draw your own judgement as a commission whether it was a
25 push poll. It certainly was from any -- and the media and

Page 71

1 others have so decided. The people that heard it have so
2 decided.

3 Anyway, we brought that information to you as
4 commissioners. Your staff did good diligence, immediately
5 requested a sworn affidavit. There's still other people
6 whose sworn affidavits have to be brought forward. The
7 case is not closed, I'd hope, and based on that we
8 discovered the number may or may not be less than we
9 anticipated. And in good faith, your staff made an
10 estimate. I made an estimate. We came to that agreement.
11 Based on that, we were offered matching funds.

12 The second point is that Media -- Media Guys
13 under contract to this shadow organization, Protect
14 Arizona Women -- parenthetically -- Protect Arizona Women,
15 who is housed in a house, an empty home, owned by the
16 owner of Arizona's List. Okay? The principals in this
17 group travel with Ms. Aboud. They're advisors to
18 Ms. Aboud. They held a -- some victory ceremony -- excuse
19 me -- a celebration which she got her \$5. They helped --
20 I believe, helped her raise her \$5 contributions. There's
21 a lot closer in positions between the group that's
22 advocating.

23 Arizona's List would pass money through
24 Tucson -- what's it called? Protecting Tucson Women, an
25 empty house owned by Ms. Sutherland, the owner of

Page 72

1 Arizona's List, with an Aboud sign in the front yard.
2 They pass that money over to Media Guys, then Media Guys
3 passed it over to maybe Data Call. We don't know. Our
4 witnesses said Data Call called them, not Media Guys. So
5 there's a lot of information here that the Commission is
6 yet to discover, and this particular poll and activity is
7 very, very close to the opposing candidate and I wish to
8 tell you what's so disclosed.

9 She -- anyway, the -- so what I request --
10 what I request is that the Commission recognize the fact
11 that their award to our campaign was done in good faith.
12 We took that money and we prepared day and night. We
13 prepared a mailing with many, many volunteers. We have
14 sent that mailer out. Our money has been expended. Your
15 money has been expended you gave through us. Our balance
16 right now -- I can't say exactly. We can file a report.
17 I brought my books with me so you can look at them and so
18 your staff can see them. That's how we run our campaign,
19 open, and we -- I think maybe we got \$600 left.

20 We may have some -- I still have to pay or
21 reimburse for gasoline and other things. So I don't know
22 exactly what the final dollars would be and I have to do
23 that by your own rules, but we would ask that the -- that
24 you allow the award to stand since everyone on my side and
25 on your side operated in good faith. Your staff requested

Page 73

1 that I help them. I helped them. I shouldn't be
2 penalized for bringing forth Media Group. You wouldn't
3 have Media Group in your grasp right now if we hadn't
4 brought you that information. You still would be under
5 investigation.

6 And so I ask you that we keep the award and I
7 condition -- we have a second issue now. There's a new
8 brochure going out. It's been provided to you. It's been
9 provided to you through a source that I can't see because
10 the Secretary of State's information does not contain, to
11 this moment, if we looked it up on the web, the fact that
12 this particular expenditure has been made. It's not on
13 the web, as we speak. Your staff got it through a
14 secondary -- through a direct source from the Secretary of
15 State. It was disclosed to me about 8:00 o'clock, 8:05
16 this morning. So I had no idea it was here, and that
17 represents an independent new expenditure.

18 We addressed the first one, what we thought
19 was responding to the -- what we -- we responded to the
20 push poll with the first 8,000. We spent that money. Now
21 here comes another one, and I think we have and are
22 entitled to a matching based on this new expenditure that
23 they've just disclosed to you after the fact through a
24 revision of their -- through a revision of their reporting
25 through the Secretary of State.

Page 74

1 And, again, I contend that this is a very low
 2 lying campaign tactic. If a company can do what they're
 3 doing here, which is to file with the Secretary of State
 4 at the proper time and then later on revise their filing
 5 to include the real expenditure, which in this case
 6 they're almost twice as much as they first expended, then
 7 you've opened the door for other groups, other groups and
 8 other -- other independent campaign expenditures to use
 9 the same tactic, which would be to file on the 23rd of
 10 August, in this case. Whenever they get caught to file
 11 again with the Secretary of State and, at that point, only
 12 through the discovery process would you know that this has
 13 happened.

14 It's an insidious practice. It should not be
 15 encouraged, and with that, I'll take any questions.

16 CHAIRPERSON BUSCHING: Thank you, sir.

17 Are there questions of Mr. Downing?

18 COMMISSIONER KUNASEK: Mr. Downing, is this
 19 Protect Tucson Women actually registered with the
 20 Secretary of State?

21 MR. DOWNING: Thank you, Commissioner
 22 Kunasek.

23 The -- what -- Protect Arizona Women was
 24 filed with the Secretary of State on the 11th of August.
 25 It received 15 -- \$2,500, 1,500 from an individual donor

Page 76

1 you, and this brochure which I'm handing you -- showing
 2 you up front is the new brochure which I saw a few hours
 3 ago for the first time. So this group is expressly
 4 organized to advocate the election of Paula Aboud.

5 They've so indicated to you. What they have
 6 not indicated and fully disclosed is other sources of
 7 funding, which was not requested. They haven't indicated
 8 the timelines, the 209 calls. They haven't indicated who
 9 they paid to give those calls. They do not fully disclose
 10 in their affidavit that they had paid Data Call and they
 11 haven't -- anyway, that's the -- so I don't think this
 12 group is being quite as up front with the Commission as
 13 they could be.

14 CHAIRPERSON BUSCHING: Thank you.

15 Are there other questions of Mr. Downing?

16 If not, thank you, sir.

17 MR. DOWNING: Thank you very much.

18 CHAIRPERSON BUSCHING: Is there anyone else
 19 from the public that wishes to speak to this matter?

20 MS. ABOUD: I'd like to speak to this matter.
 21 This is Senator Aboud.

22 CHAIRPERSON BUSCHING: Please go ahead.

23 MS. ABOUD: I appreciate the opportunity to
 24 speak to you all. The piece that I'd like to speak to
 25 that I originally intended to speak to was to reduce the

Page 75

1 the same day. Excuse me. Let me start this up. \$1,500
 2 the same day they filed with the Secretary of State. That
 3 was their full bank account. Ten days later, they write a
 4 check to Media Guys for 2,500. They didn't have 2,500 in
 5 their account. The day after that, Arizona's List, which
 6 owns the house, the empty house that they sit in, passed
 7 them \$1,000, making 2,500.

8 That's all I knew. I had no idea until this
 9 morning at 8:00 o'clock that there had been an additional
 10 expenditure made on behalf of the opposing candidate of --
 11 I'll have to even look it up because it's so knew.

12 Mr. Lang, would you help me find that number?
 13 Let's see.

14 MR. LANG: It was \$3,058.56.

15 MR. DOWNING: Yes, sir, an additional \$3,058,
 16 which they only disclosed after I provided information
 17 that they were carrying out this campaign.

18 COMMISSIONER KUNASEK: So this group is
 19 hardly very long in the tooth if they haven't even been
 20 around for a month, unless the principals of this group
 21 have been around and involved in other campaigns.

22 Do we know if they --

23 MR. DOWNING: The answer to your question,
 24 sir, is they have only organized to act in my campaign.
 25 That's the total source of their expenditures reported to

Page 77

1 amount of money awarded to representative Downing in light
 2 of the number of phone calls we made and the fact that we
 3 only know of one person that we contacted that received
 4 that phone call.

5 Speaking to these new issues that have come
 6 forward just today to my attention, the 209 calls and the
 7 brochure being sent out, I am asking for -- if Mr. Downing
 8 has spent all that money, I'm asking for equal
 9 compensation. I certainly have received the negative end
 10 of this publicity. There have been numerous articles in
 11 the local newspaper that -- I mean, I just -- my numbers
 12 have just gone down as a result of this, this publicity on
 13 the so-called push poll. I've got people doubting my
 14 authenticity as a viable candidate, just -- anyway, it's
 15 just been a really negative experience for me.

16 So I have not been happy about the publicity,
 17 and I think my campaign has been damaged as a result of
 18 the publicity that called it a push poll. In light of the
 19 fact that Mr. Downing does not have the funds to return, I
 20 would ask for equal compensation.

21 And I'm open to any questions.

22 CHAIRPERSON BUSCHING: Thank you.

23 Are there questions by the commissioners of
 24 Ms. Aboud?

25 COMMISSIONER KUNASEK: Madam Chairman, the

Page 78

1 comment Ms. Aboud just made, the number of calls that we
2 made, was that the number of calls in this poll, whatever
3 kind of a poll it may have been, that you are referring
4 to?

5 MR. LANG: Senator?

6 MS. ABOUD: Sorry. I didn't hear the end of
7 that question.

8 COMMISSIONER KUNASEK: You made a comment the
9 number of calls -- and I'm quoting -- the number of calls
10 we made.

11 MS. ABOUD: Yes. My campaign has been phone
12 calling. In my letter to you folks, we started phone
13 calling in July and we finished just recently. So --
14 well, actually, we haven't just finished. We're still
15 making calls, but I had indicated in my letter to you that
16 we had made some calls to approximately 8,000 people about
17 my candidacy and we only found one person that had
18 received that so-called push poll.

19 Is that what you were referring to?

20 COMMISSIONER KUNASEK: Yes. I was referring
21 to -- trying to get a handle on the calls made by whoever,
22 in this case. Excuse me. I'm just -- I'm a little
23 confused here because I don't know if we know all of the
24 acquaintances, the connections and so forth in this case.

25 Thank you.

Page 80

1 MR. GORDON: Members of the Commission, Madam
2 Commissioner, Andy Gordon. I do not represent either
3 candidate and I wish them both the best of luck.

4 This has been kind of an odd journey for me
5 because I just stayed too long last week, heard this issue
6 come up. I made a comment, and then when I returned from
7 vacation Tuesday night, I got a call from a long-existing
8 client of our office, Media Guys, who had read about this
9 and wanted to clarify from their view that this was a real
10 poll. So I contacted Todd, and that's what brings me back
11 here.

12 In terms of how the Commission resolves this,
13 frankly, I don't care about that either. I am concerned,
14 however, about whether or not the commissioning of a poll
15 that contains negative messages constitutes express
16 advocacy and can have no other reasonable interpretation.
17 Every poll that I have been involved in -- and that's a
18 lot -- we test very negative messages on ourselves and we
19 test very negative messages on the other side.

20 And that will be part and parcel of other
21 things, but there is very negative stuff said because you
22 want to know if the guy punches you in the face with the
23 best punch, what's the impact and if I punch the other guy
24 in the face with the best punch, what's the impact. I
25 know I'm always out here talking about dangerous

Page 79

1 CHAIRPERSON BUSCHING: Commissioner Kunasek,
2 maybe Mr. Lang can clarify better, but as I read these
3 things, Senator Aboud has made a number of calls
4 independently asking for people to vote for her as well as
5 this independent campaign committee that hired the Media
6 Guys who conducted an initial poll, whether it be a push
7 poll or not, to determine appropriate information to then
8 put in a mailer.

9 Mr. Lang, am I understanding the situation
10 correctly?

11 MR. LANG: Madam Chair, that's correct.
12 Those -- the calls that Senator Aboud refers to are
13 completely separate from the calls at issue with
14 Mr. Downing.

15 COMMISSIONER KUNASEK: Okay.

16 MR. LANG: And what she's saying is that her
17 calls turned up very few folks who had received the push
18 poll.

19 MS. ABOUD: That is correct.

20 COMMISSIONER KUNASEK: All right. Thank you
21 for clarifying that.

22 CHAIRPERSON BUSCHING: Okay. Other questions
23 of Ms. Aboud?

24 All right. I see that there's another member
25 of the audience that wishes to speak to this matter.

Page 81

1 precedents but, again, I view this as a very dangerous
2 precedent and, at the very least, the Commission has got
3 to give some kind of guidance to campaigns on when is
4 their poll going to constitute advocacy or not.

5 Polls can be very expensive. A normal
6 statewide poll where we'll call about 600 people will cost
7 about 25- to 30,000 dollars. So because most legislative
8 candidates cannot afford anywhere close to that, they just
9 try to get to the bottom line real fast on the message,
10 which is what took place here. And, again, I think under
11 the statute, it would be hard for the Commission to
12 conclude that this poll, in light of the fact it only went
13 to 209 people, had no other reasonable conclusion, which
14 is the standard in the statute.

15 And, secondly, boy, if you're going to go
16 down this path, I can tell from you every campaign -- and
17 this is both R & D. This is not just a democratic
18 thing -- we're going to need some real guidance in how to
19 sort through this. I am very concerned here in the sense
20 that this would now be considered an expenditure that
21 needed to be reported and matched earlier, which they did
22 not call me for legal advice. Had they called me for
23 legal advice, I would have told them, no, you don't have
24 to report polls at the time you take a poll; you do when
25 you're preparing the mail piece.

Page 82

1 And I think -- I understand that the
2 appropriate trigger letter was sent. So this is, again,
3 kind of dangerous ground. I'd be glad to answer any
4 questions that the Commission has, although I have fairly
5 limited knowledge of this matter.

6 CHAIRPERSON BUSCHING: Any questions of
7 Mr. Gordon?

8 If not --

9 MR. GORDON: Thanks very much.

10 CHAIRPERSON BUSCHING: Thank you.

11 I will allow five minutes for rebuttal if
12 there's no one else that wishes to speak to this matter.
13 Sir?

14 MR. DOWNING: Thank you. Thank you, and I
15 wish to thank the Commission for taking this time.

16 The two points -- and I am -- I should
17 disclose that I have a Ph.D. from Stanford as a social
18 scientist. I'm not a pollster, but I have asked a lot of
19 questions in my life. The question -- the creative
20 interpretation of this not being a push poll, which seems
21 to be of great concern to Mr. Gordon, if they were not
22 trying to influence voters, why didn't they test out their
23 messages on non-voters?

24 That's my question. They could have called
25 people that do not vote and find out the reaction. They

Page 83

1 didn't. They called high-efficacy voters in my district.
2 They spread the information, misinformation that I favored
3 spousal rape, damaging my reputation, influencing the
4 election outcome, and I think that the idea that it's part
5 of the methodology that they have to test on live voters
6 is ridiculous. Survey research often uses panels of
7 people that they pick from other parts of the street, test
8 their message and come back again, and I think that's a
9 nonviable argument on their part.

10 Second is that the -- that Senator Aboud --
11 and I will refer to her as senator, which is the proper
12 title, even though she continues to refer to me as Mr. --
13 and Senator Aboud made phone calls, 3,000 phone calls.
14 She said that no one suggested that they -- only one
15 person had suggested that they had received a push poll.
16 In her own statement to the Commission, she mentions three
17 people. So we have a little bit of a problem there, and
18 that's in her own file statement with the Commission.

19 Second is she did not ask the question, and I
20 asked for the Commission to ask her, did she ask the
21 question have you been subject to a push poll. If she
22 had, then her response that there was only one would be
23 true. Those people may have not eaten chicken last night,
24 but she didn't ask that question. So you can't say that
25 you called people about one matter and they didn't mention

Page 84

1 another and use that as evidence. It flies in the face of
2 logic.

3 Thank you.

4 CHAIRPERSON BUSCHING: Thank you, sir.

5 Any last questions of Mr. Downing?

6 MS. ABOUD: Can I respond, please?

7 CHAIRPERSON BUSCHING: Ms. Aboud, yes. You
8 may have five minutes.

9 MS. ABOUD: Thank you.

10 My statement is that we made all the phone
11 calls on behalf of my campaign and we only contacted one
12 person by phone that said -- that volunteered the
13 information that they had received the so-called push poll
14 call. The other two people turned out that were to be
15 volunteers in my campaign, so my statement is actually
16 correct. We only spoke to one person on our phone --
17 phone bank. And granted we did not ask the question, did
18 you get the push poll, however, the one person that did
19 receive that so-called call from a push poller -- or
20 whatever you call it -- it's not a push poll. I don't
21 know -- whatever it was, but volunteered it.

22 So I just -- I'm only going to suggest that
23 if people were unhappy with receiving a call from us, they
24 would have told us, We already got a call about your
25 campaign. Anyway, I just wanted to protect my information

Page 85

1 that I sent to you and verify it for you and to agree. We
2 did not ask the question.

3 So those are all my comments and I still
4 would like to request the difference in funds.

5 COMMISSIONER KUNASEK: Madam Chairman, I
6 have -- this is Carl Kunasek.

7 I have a question of you, Ms. Aboud.

8 MS. ABOUD: Yes.

9 COMMISSIONER KUNASEK: You -- I respect you
10 made 3,000 calls.

11 How many of those 3,000 calls were made after
12 August 21st to 23rd?

13 MS. ABOUD: Let's see, August 21st. Did you
14 say August 21st to 23rd?

15 COMMISSIONER KUNASEK: Yes, ma'am.

16 MS. ABOUD: Let's see. Well, we -- we made
17 approximately 6,000. So we made approximately 3,000, I
18 would guesstimate, after August 21st.

19 COMMISSIONER KUNASEK: Thank you.

20 CHAIRPERSON BUSCHING: Any other questions of
21 Ms. Aboud?

22 If not, I'll turn to Mr. Lang and ask you if
23 you have any further comments or -- yeah, any further
24 comments.

25 MR. LANG: Thank you, Madam Chair,

Page 86

1 Commissioners.

2 I guess I have three main points. First,
3 representative Downing, in my opinion, is not entitled to
4 additional money for the new mailer because we already
5 gave him too much money for the poll and the new mailer is
6 included in that calculation, so I think he's not entitled
7 to new money for the new mailer.

8 Similarly, Senator Aboud is not entitled to
9 new money because of the expenditure, though she -- she
10 tells us she had nothing to do with it and was hurt by it.
11 And I understand her point, but that's the danger of
12 independent expenditures. And independent expenditures
13 need to keep that in mind; that their candidates may not
14 want them to do these actions, whether it's a mailer, a TV
15 commercial or a push poll. And so she's not entitled to
16 matching funds either because it just doesn't meet the
17 definition of independent express advocacy visa vie her.

18 And then the final point is how much to
19 award, if any, and I think Mr. Gordon raises a good point
20 about the cost of a poll. If the poll meets the
21 definition of express advocacy, it should be included in
22 the calculation but, as I told you, it is a close call and
23 it's precisely for the reasons he describes because our
24 standard, though, perhaps not any longer -- no longer
25 constitutionally required under McConnell, it is our

Page 87

1 standard under the statute and we have to abide by it.

2 And here the poll does have arguably another
3 purpose, which is to test -- test opinions and to evaluate
4 possibilities for this mailer. If that's the case and it
5 doesn't count, then the amount -- the difference or the
6 amount allegedly that I claim would be owed by Mr. Downing
7 would be reduced to \$1,915.44. I think it's a close call
8 because this is clearly a push poll in the sense that
9 those are negative questions that hurt Mr. Downing. The
10 publicity that came out hurt Mr. Downing and -- well,
11 frankly, it probably hurt everyone involved, Senator Aboud
12 as well.

13 And so there's good reason to find that it's
14 express advocacy, but I think there's a good argument that
15 it is not simply because it has two purposes, one which is
16 express advocacy and the other which is to gather
17 information. Based on that, I recommend that the
18 Commission request that Mr. Downing return \$1,915.44,
19 provided that he's not already spent it. If he has spent
20 it, I think, given the fact that we did this estimation in
21 good faith, both the staff and Mr. Downing responded and
22 spent his money in good faith, I think that he should not
23 be required to return that money.

24 Similarly, because it was done in good faith
25 and with the idea of fairness and done with the best

Page 88

1 information possible, Senator Aboud should not be rewarded
2 an equal amount because she's simply not entitled to it
3 and this was done in good faith. And, again, I would say
4 to the Independent Expenditure Committee that was involved
5 in this case, that they should reconsider their actions in
6 the future but, ultimately, what the statutes require is
7 that the money be returned if it's available.

8 CHAIRPERSON BUSCHING: Thank you.

9 Any final questions of Mr. Lang? If not, the
10 Chair will entertain discussion or a motion.

11 Commissioner Jolley.

12 COMMISSIONER JOLLEY: Can I make the motion?

13 CHAIRPERSON BUSCHING: Sure.

14 COMMISSIONER JOLLEY: Okay. Well, I will
15 state in the matter of matching funds to Mr. Ted Downing,
16 a participating candidate for senate in Legislative
17 District 28, that the Commission reconsider the amount of
18 matching funds originally disbursed to Mr. Downing in this
19 matter. The recommended revised amount of matching funds
20 is \$4,558.56; that the Commission request Mr. Downing
21 cease spending and issue a repayment to the fund for the
22 monies not yet expended in excess of the revised amount by
23 September 19, 2006.

24 CHAIRPERSON BUSCHING: Okay. Is there a
25 second?

Page 89

1 No second. Well, then I'll ask for
2 discussion or further -- or another motion.

3 COMMISSIONER PARKER: This is Commissioner
4 Parker.

5 CHAIRPERSON BUSCHING: Commissioner Parker.

6 COMMISSIONER PARKER: I don't understand how
7 we can say one week that this poll was a push poll and
8 then this week try to say that it was not. I have great
9 difficulty with that, and I think that had this Tucson
10 Arizona Women's Group come forward a lot sooner, it would
11 have saved us all a lot of grief. However, based on
12 the -- the fact that we were doing things in -- as best as
13 we could, I think that we should not request Mr. Downing
14 to return the money because, as he said, he is already
15 committed to spending that money on a mailer to counter
16 the effects of the push poll. And I think it would be
17 wrong for us to request the money back when we already
18 told him that he could have it.

19 CHAIRPERSON BUSCHING: All right. Well, I
20 agree with you that it's difficult to request the money
21 back if he's already spent it. To me, I think that we set
22 a bad precedent if we just say, okay, we're not going to
23 issue an order requiring money to be spent back -- to be
24 returned if it hasn't been spent. I think that in this
25 case, if we do make an erroneous decision in the first

Page 90

1 instance, we owe it to the candidate and both the pro
2 candidate and the candidate against whom this caused to
3 correct our situation and at least acknowledge that we
4 either underestimated or overestimated and issue a
5 modified order accordingly.

6 So I tend to want to follow the
7 recommendation of the Executive Director and reconsider
8 this matter with an order that the \$1,915.14 be returned
9 if it's still available as a part of Mr. Downing's funds.

10 COMMISSIONER PARKER: Well, I believe
11 Mr. Downing already told us that he only had about \$600
12 left in his campaign account, if I remember his comments
13 of today correctly.

14 CHAIRPERSON BUSCHING: Yes, I agree, and so
15 the ultimate result may be that, in fact, even though an
16 order is issued for some other amount, he may not have to
17 return any monies at all, but I think the record should be
18 clear that it says that we think that the amount is more
19 appropriately -- or the result is more appropriately that
20 an amount should be returned if it's available to be
21 returned.

22 COMMISSIONER PARKER: I have one further
23 question about propose a motion.

24 Would we be saying that --

25 CHAIRPERSON BUSCHING: I don't think there's

Page 91

1 any motion on the table right now.

2 COMMISSIONER PARKER: Okay. Well, I guess my
3 other question is would we be reversing ourselves in not
4 calling this poll a push poll if we ask him to return the
5 monies? Because based on what we heard last week, that
6 sure did sound like a push poll to me.

7 CHAIRPERSON BUSCHING: Mr. Lang, do you want
8 to respond to that?

9 MR. LANG: Thank you, Madam Chair,
10 Commissioners.

11 It sounded like a push poll to me as well,
12 Commissioner Parker. And I still think it sounds like a
13 push poll, but ultimately when you look at the definition
14 of push poll, if you've only contacted 209 people, it's
15 simply not just an effective way to do a push poll. I
16 mean, you're not going to change the outcome of an
17 election by only calling 200 people. Now, given the press
18 coverage and the like, it was more effective than just
19 calling 209 people, but that's not how you evaluate what's
20 a push poll. A push poll is a very large number of people
21 done over a short time.

22 And so I think while it looks like a duck and
23 walks like a duck, I don't think it's a duck in this case.

24 I think it's a legitimate poll done designed -- as
25 Mr. Gordon alluded to, designed -- you know, campaigns

Page 92

1 test messages all the time, and they were testing negative
2 messages towards Mr. Downing.

3 And so for that reason, I think we can
4 reconsider based on the information received -- you know,
5 in a sense, you know, I don't look at what we did -- what
6 the Commission did or what I recommended last week as a
7 mistake. I look at it as a success. We made a
8 recommendation based on the information we had and, as a
9 result, this group came forward and provided the voters
10 and us and the candidates with the proper information.
11 And so I don't think we're correcting a mistake. I think
12 we just have more information and now can get a more
13 accurate result.

14 And so, for that reason, I stand by my
15 recommendation that we ask Mr. -- representative Downing
16 to return the full amount. You know, it occurred to me
17 when I did -- when I took out the cost of the poll, I
18 actually did it backwards. I mean, if we take out the
19 cost of the poll, then the actual difference is actually
20 more. Given the notice we gave to Mr. Downing, I don't
21 think it's fair to ask for that greater amount. And so I
22 stand by my recommendation that we ask for the full
23 \$3,415.44 back given, though, that he would not be
24 required to return any money that he's already spent.

25 CHAIRPERSON BUSCHING: Commissioner Jolley.

Page 93

1 COMMISSIONER JOLLEY: Yes. Well, isn't part
2 of your recommendation stating that he issue a repayment
3 to fund for the monies not yet expended?

4 MR. LANG: That's right.

5 COMMISSIONER JOLLEY: So really we can't --

6 MR. LANG: Up to that amount.

7 COMMISSIONER JOLLEY: Yeah, but we can't put
8 a dollar amount on that until we find out what he has
9 expended the funds on.

10 MR. LANG: Madam Chair, my -- Commissioner
11 Jolley, my suggestion is that we ask for the full amount
12 back but require him only to pay up to that amount with
13 what he has left. If it's less than that amount, he
14 need only pay that. In other words, he should cease
15 spending money after this meeting.

16 COMMISSIONER JOLLEY: Okay.

17 MR. LANG: And then return whatever he has
18 left, whether it's \$600 or what have you.

19 COMMISSIONER KUNASEK: That's a point of
20 clarification because the argument or the discussion in
21 previous meetings on when money was committed and expended
22 and so forth, anything -- I would say anything that he has
23 already contracted for, even though it has not yet been
24 expended, he should be allowed to meet those obligations.

25 MR. LANG: Madam Chair, Commissioners, I

Page 94

1 agree to a great extent; however, I would point out that
 2 in 2002, I believe it was, the Karen Johnson matter, we --
 3 in that matter she was required -- she became unopposed
 4 and so her -- her entitlement to funding went way down.
 5 And in that matter, the Commission required her to return
 6 all money that had yet not been expended, and she was
 7 concerned because she had made all these contracts with
 8 sign folks and other folks and she wanted to be able to
 9 keep that money.

10 And what the Commission said was, no, you
 11 need to return that money in so much as you can cancel
 12 those contracts and get out of them. Now, if you can't,
 13 then that's a difference story. And in the case of
 14 Mr. Downing, what I would suggest is he has to return all
 15 money not yet spent and not yet allocated for contracts,
 16 and if there are monies allocated for contracts, he should
 17 try to cancel them if he can. If that results -- you
 18 know, if there's a penalty or something, it results in
 19 less money. This is all academic, but that's my
 20 recommendation.

21 CHAIRPERSON BUSCHING: And, Mr. Lang, during
 22 this discussion, at one time I think you were reducing the
 23 amount of your recommendation for repayment, but if I just
 24 heard you correctly, you are now reinstating what you
 25 wrote in your recommendation?

Page 96

1 correct. And so, in a sense, we're penalizing him for
 2 helping us do our job.

3 CHAIRPERSON BUSCHING: Mr. Lang?

4 MR. LANG: I think that's a very valid point,
 5 if it's true, and it would -- I would have recommended no
 6 return of money given that for precisely the reasons
 7 Commissioner Parker is discussing. And I am sorry I
 8 didn't address it, but I don't know whether this is true
 9 or not. All I know is what happened in the sequence of
 10 events. Andy Gordon contacted me without knowing about
 11 what was going on -- and this was on Tuesday, I believe,
 12 or it may have been -- I think it was yesterday, actually,
 13 yesterday morning and told me that he had these clients
 14 and this was the situation.

15 And I never told him anything, but it may be
 16 that his clients went to him when they got wind of what we
 17 were up to. But it's not like I went to Andy Gordon and
 18 said, We know it's Media Guys, so what's going on; give me
 19 more information. He came to me and so for that reason, I
 20 don't know for a fact that it was -- and I have to --
 21 Mr. Downing was wonderful. He really did --
 22 Representative Downing provided us all the information he
 23 could and worked very hard on this, but the fact is I
 24 don't know that that's what motivated Andy Gordon to come
 25 to me.

Page 95

1 MR. LANG: Yes, Madam Chair, because it
 2 occurred to me that the cost of the poll, if it's express
 3 advocacy, counts towards what's already been given to him.
 4 And although he's -- you know, he's arguing that it is
 5 express advocacy, it's actually in his best -- you know,
 6 it should be -- and to him that would be correct, but if
 7 it's not express advocacy because it has the dual purpose,
 8 then it would be -- it would not count towards the money
 9 already spent and he would actually owe more money.

10 And I did it backwards. I deducted it from
 11 the difference and I should have added it to the
 12 difference but, in fairness, I don't think we should add
 13 it simply because there's been no notice of that. And
 14 more, it sounds like it's an academic point, anyway,
 15 because he doesn't have the money either way. So I
 16 recommend the initial -- I recommend the initial
 17 recommendation of 4,000 -- I mean, \$3,415.44.

18 CHAIRPERSON BUSCHING: All right.

19 COMMISSIONER PARKER: I have one other
 20 comment. This is Commissioner Parker.

21 CHAIRPERSON BUSCHING: Yes.

22 COMMISSIONER PARKER: I think Mr. Downing
 23 helped us considerably by finding out who it was that was
 24 doing this poll and they had not come forward until we
 25 went looking for them, if that's -- my understanding is

Page 97

1 COMMISSIONER PARKER: Okay.

2 CHAIRPERSON BUSCHING: All right. Any
 3 further discussion before we have a motion?

4 If not, the Chair will entertain a motion.

5 COMMISSIONER KUNASEK: Madam Chair, I would
 6 move that the Downing campaign refund the funds that have
 7 been awarded that have not been committed or expended at
 8 this time.

9 CHAIRPERSON BUSCHING: The total amount or
 10 the amount recommended by the Executive Director?

11 COMMISSIONER KUNASEK: Whatever amount has
 12 not been committed or expended at this time.

13 CHAIRPERSON BUSCHING: All right. Is there a
 14 second?

15 COMMISSIONER JOLLEY: I will second that.

16 CHAIRPERSON BUSCHING: It's been moved by
 17 Commissioner Kunasek and seconded by Commissioner Jolley
 18 that the Downing campaign refund any monies that have not
 19 been committed or expended, and I assume that's in
 20 accordance with Mr. Lang's --

21 COMMISSIONER KUNASEK: Yes.

22 CHAIRPERSON BUSCHING: -- prior discussion.

23 COMMISSIONER KUNASEK: Well, that's
 24 essentially what I heard him say.

25 CHAIRPERSON BUSCHING: Okay.

Page 98

1 MR. LANG: You know, up to the -- up to the
 2 amount calculated.
 3 CHAIRPERSON BUSCHING: All right. Any
 4 further discussion? If not, the Chair will call for the
 5 question.
 6 All in favor say aye.
 7 (Chorus of ayes.)
 8 COMMISSIONER PARKER: Nay.
 9 CHAIRPERSON BUSCHING: Okay. The Chair votes
 10 aye. The motion carries.
 11 The next item on the agenda is Item VII, call
 12 for public comment. This is the time for consideration
 13 and discussion of comments and complaints from the public.
 14 Action taken as a result of public comment will be limited
 15 to directing staff to study the matter or rescheduling the
 16 matter for further consideration and decision at a later
 17 date or responding to criticism.
 18 Is there anyone from the public that wishes
 19 to speak?
 20 If not, we'll move to the last item, Item
 21 VIII, adjournment.
 22 Is there a motion?
 23 COMMISSIONER JOLLEY: I will make that
 24 motion.
 25 CHAIRPERSON BUSCHING: Is there a second?

Page 99

1 COMMISSIONER KUNASEK: Second.
 2 COMMISSIONER PARKER: Second.
 3 CHAIRPERSON BUSCHING: It's been moved by
 4 Commissioner Jolley and seconded by Commissioner Parker
 5 that we adjourn.
 6 All in favor say aye.
 7 (Chorus of ayes.)
 8 CHAIRPERSON BUSCHING: Oppose, nay.
 9 The motion carries. The meeting is
 10 adjourned.
 11 (Whereupon the meeting adjourned at 12:15
 12 p.m.)
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 100

1
 2 1 C E R T I F I C A T E
 3 2
 4 3 I, Lilia Monarrez, Certified Reporter, do hereby
 5 4 certify that the foregoing pages numbered 1 through 99,
 6 5 inclusive, constitute a full and accurate printed record of my
 7 6 stenographic notes taken at said time and place, all done to
 8 7 the best of my skill and ability.
 9 8 DATED, at Phoenix, this 11th day of September, 2006.
 10 9
 11 10
 12 11
 13 Lilia Monarrez
 14 12 Certified Reporter, AZ50699
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Draft Copy